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No. 05-

IN THE

Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of ZACHARY DEAL,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491o, which requires participating States to "ensure that all children with disabilities have available to them a free appropriate public education," *id.* § 1400(d)(1)(A), is satisfied when a school board provides disabled children with "*some* educational benefit" that is non-de minimis, as this Court indicated in *Board of Education* v. *Rowley*, 458 U.S. 176, 200 (1982) (emphasis added), or whether school boards must satisfy a heightened and inherently subjective standard by providing a "*meaningful* educational benefit."

2. Whether local educational authorities can use their educational expertise to prepare Individualized Education Program ("IEP") proposals in advance of IEP meetings or must instead bow to the unilateral dictates of parents regarding a child's IEP.

PARTIES TO THE PROCEEDING

All the parties in this case are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hamilton County Department of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 392 F.3d 840 (6th Cir. 2004). Its decision denying the petition for rehearing *en banc*, (Pet. App. 115a), is unreported.

The August 20, 2001 opinion and order (Pet. App. 63a-114a) of the Tennessee State Department of Education administrative law judge is unreported. The March 4, 2003 opinion and order (Pet. App. 43a-62a) of the United States District Court for the Eastern District of Tennessee is reported at 259 F. Supp. 2d 687 (E.D. Tenn. 2003).

JURISDICTION

The court of appeals denied a timely petition for rehearing on April 1, 2005. Pet. App. 115a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 20 U.S.C. § 1401(9), which provides that:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

STATEMENT OF THE CASE

This case raises fundamentally important questions that directly affect the ability of local school boards and States to use their educational expertise to determine how best to marshal and allocate scarce resources to educate disabled children.

In *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), this Court held that the Education of Handicapped Act (later renamed the Individuals with Disabilities Education Act ("IDEA" or the "Act")), requires participating States to provide meaningful access to an education "sufficient to confer *some educational benefit* upon the handicapped child." *Id.* at 200 (emphasis added). The Court declined, however, "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. In the ensuing two decades, the indeterminate nature of this approach has led to confusion and a deep division in the lower courts. Specifically, the circuits have split on whether educational programs must provide *some* non-de minimis educational benefit, or must instead satisfy a heightened and inherently subjective *meaningful* educational benefit standard. The time has come for the Court to provide further guidance on the meaning of "some educational benefit" and this case is the perfect vehicle for that undertaking.

In the decision below, the Sixth Circuit joined the minority of courts which have held that, to satisfy the IDEA's requirement of "a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), it is not enough for States to provide an educational program that "is reasonably calculated to [provide a] more than *de minimis* educational benefit." Pet. App. 33a. Instead, the lower court held, States must provide

disabled children with a "'*meaningful* educational benefit.'" *Id.* at 34a. On the basis of this heightened standard, the Sixth Circuit rejected as inadequate an individualized education program for an autistic child that was based on a scientifically acceptable teaching methodology and consisted of 35 hours per week of special education, including physical and speech therapy. The lower court remanded the case for a determination whether, under its "meaningful educational benefit" test, petitioner is obligated to pay for the particular—and decidedly more costly—in-home therapy technique favored by the child's parents.

Petitioner's proposed educational plan would undoubtedly have passed muster under the standard employed by the majority of circuits, which require only that schools provide *some* non-de minimis educational benefit. That standard, which appropriately defers to the educational expertise of local school officials, ensures that federal courts do not entangle themselves in complex and difficult assessments of how best to educate children with a host of varying disabilities. It also ensures that federal courts will not, inadvertently or otherwise, dictate local educational policy, by mandating expensive potential-maximizing programs that inevitably force local schools to forgo other, competing educational priorities.

Indeed, the decision below exacerbates this very danger. The Sixth Circuit held that petitioner's consideration of the cost implications of providing the particular therapy that respondents advocated gave rise to a procedural violation of the IDEA. According to the lower court, such considerations constituted impermissible predetermination. This ruling, too, conflicts with the view of the majority of circuits.[1]

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[1] This Court recently recognized the importance of determining, when a child's IEP is challenged, whether parents or school boards bear the burden of proof, by granting certiorari in *Schaffer* v. *Weast*, 377 F.3d 449

The legal and fiscal ramifications of this case are enormous. In 2003, school systems around the country served nearly 7 million children under the IDEA. The "meaningful benefit" and predetermination standards the lower court employed authorize federal court micromanagement of fundamentally local educational policy. This Court should grant the petition to clarify the legal standards applicable to these important cases.

A. The IDEA.

Congress enacted the IDEA pursuant to its power under the Spending Clause. See 20 U.S.C. § 1412(a). Accordingly, Congress uses federal monies to induce States to provide disabled children with "a free appropriate public education." *Id.*; see also *id.* §§ 1401(9), 1412(a)(1). To this end, local school systems are required, with parents' participation, to develop and implement an individualized education program ("IEP") for each disabled child. *Id.* § 1401(14); see also 34 C.F.R. §§ 300.340-.350. IEPs determine educational placement for disabled children and must be revised annually. 20 U.S.C. § 1414(d). IEP disputes are subject to administrative and judicial review. *Id.* § 1415.

B. The *Rowley* Opinion.

In *Rowley*, this Court answered two questions regarding the precursor to the IDEA. First, "[w]hat is meant by the Act's requirement of a 'free appropriate public education'?" 458 U.S. at 186. Second, "what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415?" *Id.*

To answer the first question, this Court sought to discern the meaning of the Act's "cryptic" definition of a "free appropriate public education," or "FAPE," *id.* at 187-89, and held that a State provides a FAPE by "providing personalized

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(4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698). The Sixth Circuit's predetermination ruling raises related questions.

instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The Court made clear, however, that provision of a FAPE does not require States to "maximize the potential of handicapped children." *Id.* at 189. Indeed, the Court explained "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21. "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189. To discern such a substantive standard, the Court turned to the Act's legislative history. *Id.* at 190-92.

That history led the Court to draw a sharp distinction between educational *access* and educational *benefit*. The Court explained that Congress intended to help disabled children by extending access to special education, even though it understood such special education could not be substantively guaranteed to produce any particular outcome:

> By passing the Act, Congress sought primarily to make public education *available* to handicapped children. But in seeking to provide such *access* to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access* meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Thus, the intent of the Act was more to *open the door* of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192 (alteration in original) (emphases added) (citation omitted). The Court attributed the focus on "access"—as opposed to "any particular substantive level of education"—to Congress's reliance on two "landmark" district court cases.

Id. at 192-93 (citing *Pennsylvania Ass'n for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)). The Court explained that both cases focused on "*access* to an adequate, publicly supported education," but "[n]either case purport[ed] to require any particular substantive level of education." *Id.* at 193.

Accordingly, Congress intended to afford "meaningful" access to public education, *id.* at 192, but required only that "the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child." *Id.* at 200 (emphasis added). Thus, while the Act requires States to provide *meaningful access* to education, it only requires "*some* educational benefit." *Id.* (emphasis added).

In answer to the second, procedural question, this Court held the Act's "provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Indeed, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Id.* at 207. The "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* Congress sought to limit federal judicial scrutiny, because the Act's "require[ment] that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that *due weight* shall be given to these proceedings." *Id.* at 206 (second alteration in original) (emphasis added). In short, "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208

(quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973)).

Still, this Court was careful to explain that "[e]ntrusting a child's education to state and local agencies does not leave the child without protection," because the Act ensured parental involvement in IEP formulation. *Id.* at 208. The Court had no doubt that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Id.* at 209.

On the basis of these legal standards, the Court reversed the Second Circuit, and held the Act did not require the school to provide Amy Rowley with a sign language interpreter. *Id.* at 209-10. In reaching this result, however, the Court found it unnecessary "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Rather, the Court concluded that, because Amy was receiving personalized instruction and related services calculated to meet her educational needs, and was performing better than the average child in her class, she was necessarily receiving an "appropriate" education.

C. Zachary Deal's IEPs.

The Deals are the parents of Zachary, an autistic elementary school boy. Pet. App. 1a. Zachary was diagnosed as autistic at the age of three. *Id.* at 2a. His parents have an unbending belief that Zachary can only benefit from the applied behavioral analysis ("ABA") developed by Dr. Ivar Lovaas at UCLA. *Id.* at 3a. The Deals thus have insisted from day one that the only FAPE for Zachary must contain a significant amount—at least 30 hours—of Lovaas-style ABA. *Id.* at 3a-5a.

Petitioner Hamilton County Department of Education devised a 1998 IEP for Zachary that was 95 pages in length and provided for 35 hours per week of special education instruction. Pet. App. 3a-4a. The plan also provided physical and speech therapy. *Id.* at 4a. The Deals object to that report,

arguing that the petitioner should fund what they describe as a "private ABA program in the home." *Id.* In 1998, Zachary only spent 16 percent of his time in the School System, even though petitioner declined to pay for the in-home services. *Id.*

In its 1999 IEP, petitioner proposed that Zachary participate in the comprehensive development class program that was the core of the earlier program proposed for Zachary, and the IEP added a series of programs designed to ease Zachary into mainstream kindergarten classes. Pet. App. 4a-5a. The teaching methods would include one-on-one discrete teaching with a variety of special education programs, including speech and language therapy and occupational and physical therapy. *Id.* The Deals rejected this plan outright and enrolled Zachary in a private school to provide him with more time in regular classes. *Id.* at 5a. Consequently, Zachary did not attend public school at all during the 1999 school year. *Id.*

Although petitioner proposed placement in a regular education kindergarten class for the year 2000 and additional therapies along the lines identified in the 1999 IEP, the Deals rejected that plan in favor of their private program, for which they requested full reimbursement. Pet. App. 5a. Zachary did, however, attend the public school part-time during the 2000 school year. *Id.*

D. Proceedings Below.

The Deals brought this action under the IDEA. Pet. App. 1a. The matter was first submitted to a Tennessee Department of Education Administrative Law Judge ("ALJ"), who held a 27-day trial. *Id.* at 63a-114a. The ALJ held that the School System *procedurally* violated the IDEA by predetermining that Lovaas-style ABA was not appropriate for Zachary and by not having a regular education teacher attend the IEP meetings. *Id.* at 98a-99a. The ALJ also held that the School System *substantively* violated the IDEA by

failing to provide Zachary with a proven methodology for dealing with his autism and by failing to provide Zachary with extended school year ("ESY") services in 1999. *Id.* at 101a-106a. Accordingly, the ALJ concluded that the Deals were entitled to reimbursement for 30 hours per week of home-based ABA services, which would continue until a properly constituted IEP team was established. *Id.* at 108a-109a.

The parties cross-appealed to the United States District Court for the Eastern District of Tennessee. Pet. App. 43a-62a. The district court accepted the record as developed by the ALJ, but granted the School System's request to supplement the record. *Id.* at 46a. The district court recognized that it needed to give "due weight to the ALJ's findings of fact," *id.* at 47a, but also explained it was duty-bound to make independent findings with deference to the "school district's choice about the appropriate educational methods for a disabled child." *Id.* at 48a.

On the procedural question of predetermination, the district court held that petitioner was permitted to have the representatives of the School System meet *ex parte* and to form an opinion about the advisability of using the Lovaas-style ABA to assist Zachary. Pet. App. 54a-55a. The key was the ability of the parents to present their arguments forcefully and without any limits having been imposed on their level of participation.[2] *Id.*

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[2] With regard to the failure to have regular classroom teachers available, the district court held that there were only two IEP meetings involved. Pet. App. 55a. One took place long before Zachary was old enough to attend school and the other was during a year when Zachary was not attending public school. *Id.* at 55a-56a. Thus, the district court held that this procedural irregularity had no effect on Zachary's IEP. *Id.* In addition, the district court rejected any suggestion that the IEP team must have an ABA expert on it, as the ALJ had ordered. *Id.* at 56a.

Regarding the substantive violations, the district court held that petitioner did not deprive Zachary of a FAPE by refusing to pay for his home-based Lovaas-style ABA. Pet. App. 58a-61a. The district court held that "nowhere in [the] IDEA is there a requirement that a FAPE cannot be eclectic [as proposed by petitioner], or cannot employ multiple teaching approaches." *Id.* at 58a. The district court credited one expert's testimony that "there is no scientific consensus that any one method of treating autism is any better than another." *Id.* The district court also rejected the ALJ's suggestion that petitioner improperly "consider[ed] cost in the formulation of an IEP so long as the IEP provides a FAPE for the handicapped child." *Id.* The district court then held that petitioner's "program was appropriate for Zachary, not only because it provided an acceptable methodology, but because [the School System] had qualified personnel to implement it." *Id.* at 60a.

On appeal, the Sixth Circuit reversed. Pet. App. 42a. In doing so, the court of appeals made two critical holdings. *Id.* at 21a-29a, 32a-40a. First, it reinstated the ALJ's conclusion that petitioner had predetermined Zachary's IEP by conducting a meeting *ex parte* and refusing to accede to all the Deals' demands, thereby procedurally violating the IDEA. *Id.* at 21a-29a. Second, it categorically rejected the premise that a school district satisfies its obligation to provide a FAPE by providing an educational program that "is reasonably calculated to enable the child to derive more than *de minimis* educational benefit." *Id.* at 33a. Instead, the lower court held that "an IEP [must] confer a 'meaningful educational benefit.'" *Id.* at 34a. Ultimately, the court of appeals remanded for further fact-finding based on this heightened "meaningful" benefit standard. *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

There is a clear circuit split regarding whether participating States satisfy the IDEA's requirement of a "free appropriate

public education" by providing disabled children with some non-de minimis educational benefit, or whether States must instead provide such children a "meaningful educational benefit." Furthermore, the Sixth Circuit's predetermination ruling inappropriately allows parents, rather than expert educators, to dictate unilaterally their children's IEP placements. These issues are of fundamental importance. They directly affect the ability of local school boards and States to use their educational expertise to determine how best to marshal and allocate scarce resources to educate disabled children. If allowed to stand, the erroneous legal standards the Sixth Circuit and other courts of appeals have adopted will inevitably entangle federal courts in complex educational policy disputes that, as this Court recognized in *Rowley*, they lack the expertise to resolve. Accordingly, this Court should grant the petition to resolve these important and recurring questions of federal law.

I. THERE IS A CLEAR SPLIT IN THE CIRCUITS CONCERNING HOW STATES COMPLY WITH THEIR OBLIGATION TO PROVIDE A "FREE APPROPRIATE PUBLIC EDUCATION."

The circuit split regarding whether States provide a FAPE under the IDEA by providing *some* educational benefit or a *meaningful* educational benefit is ripe for this Court's review. To date, most of the circuits have weighed in on this issue with fundamentally varying results.

The majority of circuits merely require States to provide "some educational benefit." This is the rule of the First, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005); *Missouri Dep't of Elementary & Secondary Educ.* v. *Springfield R-12 Sch. Dist.*, 358 F.3d 992, 999 n.7 (8th Cir. 2004); *A.B. ex rel. D.B.* v. *Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *Maine Sch. Admin. Dist. No. 35* v. *Mr. & Mrs. R.*, 321 F.3d 9, 11 (1st Cir. 2003); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 & n.3 (7th Cir. 2002); *O'Toole*

ex rel. O'Toole v. *Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 700 (10th Cir. 1998); *JSK ex rel. JK* v. *Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991). As the D.C. Circuit has explained, this standard follows from *Rowley* itself, which "requires only that schools provide 'some educational benefit.'" *Reid*, 401 F.3d at 523 (quoting *Rowley*, 458 U.S. at 200, and explaining why this modest standard does not guarantee the right to undo any educational damage done by prior violations of the IDEA).

This modest standard is also consistent with the deference courts owe expert professional educators. As the Fourth Circuit has explained, courts should "not 'disturb an IEP simply because [they] disagree with its content,' and [they] are obliged to 'defer to educators' decisions as long as an IEP provided the child [with] the basic floor of opportunity that access to special education and related services provides.'" *MM ex rel. DM* v. *School Dist.*, 303 F.3d 523, 532 (4th Cir. 2002) (quoting *Tice ex rel. Tice* v. *Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990)). Accordingly, a number of courts have squarely rejected the "meaningful educational benefit" standard that the Sixth Circuit adopted below. See *JSK*, 941 F.2d at 1572 (refusing to adopt "meaningful benefit" standard "to the extent 'meaningful' means anything more than 'some' or 'adequate' educational benefit"); *A.B.*, 354 F.3d at 319, 330 (distinguishing "'meaningful access' to public education" and the requirement that a FAPE "must only be calculated to confer *some* educational benefit," and reversing district court decision because the "IDEA's FAPE standards are far more modest than to require that a child excel or thrive") (internal quotation marks omitted); see also *Todd*, 299 F.3d at 905 n.3 (noting difference between standards, but finding that the school district would prevail even under the "'meaningful benefit'" test).

On the other hand, a minority of circuits require States to satisfy the heightened "meaningful educational benefit" standard. This is the rule of the Second, Third, Fifth, Sixth,

and Ninth Circuits. Pet. App. 34a; *Shore Reg'l High Sch. Bd. of Educ.* v. *P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Adam J. ex rel. Robert J.* v. *Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-09 (5th Cir. 2003); *Adams* v. *Oregon*, 195 F.3d 1141, 1149-50 (9th Cir. 1999); *Mrs. B.* v. *Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997). Like the Sixth Circuit in the decision below, these courts reject the notion that the IDEA's requirement of a "free appropriate public education" is a modest standard that simply requires some non-de minimis educational benefit. Although dutifully acknowledging this Court's admonition that an "'appropriate'" education does not mean "a potential-maximizing education," *Rowley*, 458 U.S. at 197 n.21, these courts have attempted to identify an intermediate standard between "some" benefit and a "maximum" benefit, pursuant to which an IEP must "be reasonably calculated to confer a *meaningful* benefit on the child," *Adams*, 195 F.3d at 1150 (emphasis added), that is, a benefit that is more than "'a mere modicum,'" and is instead "'likely to produce progress.'" *Adam J.*, 328 F.3d at 808-09 (citations omitted).

This minority rule appears to be based on a misreading of this Court's opinion in *Rowley*. But whatever its source, the circuit split it has engendered implicates a number of important policy concerns for our public educational structure that makes the issue of paramount importance.

A. The Minority Rule Misreads *Rowley*.

The minority rule appears to be based on a misreading of *Rowley*. In *Rowley*, this Court held a State provides a FAPE as long as "the education to which access is provided [is] sufficient to confer *some* educational benefit." 458 U.S. at 200 (emphasis added). Nevertheless, a minority of circuits appear to have conflated the standard for *access* to education (meaningful access) with the standard for the substance of that education (some educational benefit). In doing so, these circuits have adopted an untenable legal standard.

The Third Circuit was the first to commit this error. In *Polk* v. *Central Susquehanna Intermediate Unit*, the Third Circuit reversed a district court's application of the some-educational-benefit standard. 853 F.2d 171, 172 (3d Cir. 1988). The Third Circuit reasoned that the district court's reliance upon *Rowley*'s language was "out of context" and "beyond [its] narrow holding." *Id.* Though the Third Circuit conceded that the *Rowley* Court "focused on *access* to special education rather than the content of that education," *id.* at 179, the court of appeals slid past this Court's careful distinction between access and substantive content:

> Although the tenor of the *Rowley* opinion reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education and its emphasis on the *procedural* protection of the IEP process, it is clear that the Court was not espousing an entirely toothless standard of substantive review. Rather, the *Rowley* Court described the level of benefit conferred by the Act as "meaningful."

Id. (quoting *Rowley*, 458 U.S. at 192).

In fact, the *Polk* court took the word "meaningful" out of context. Read in context, the Court was clearly addressing congressional concern with "access to public education," *Rowley*, 458 U.S. at 192, not the substantive benefit of that education. This is made clear by the next two sentences in *Rowley* itself:

> Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. (alteration in original) (emphasis added) (citation omitted).

In the decision below, the Sixth Circuit was mistakenly persuaded by the Third Circuit's faulty reading of *Rowley* and the IDEA's legislative history. Pet. App. 34a-35a, 37a n.16 (explaining with approval that the *Polk* court noted *Rowley* "was a narrow decision [because] the precise issue of how much educational benefit must be provided had not been squarely before the Court," and therefore "relied on *Rowley*'s use of the word 'meaningful,' as well as legislative history emphasizing the importance of self-sufficiency, to find that the educational benefit must be more than *de minimis*"). The Sixth Circuit's independent review of legislative history led it to conclude that, "[a]t the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child." *Id.* at 38a. Accordingly, the Sixth Circuit adopted the minority's meaningful-educational-benefit standard.

Indeed, in dictum the court of appeals stated the "implication from these manifestations of congressional intent might be that, where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required." Pet. App. 38a n.17. This dictum is difficult to square with *Rowley*. Not only did the *Rowley* Court explicitly hold that the IDEA never requires a "potential-maximizing education," 458 U.S. at 197 n.21, but the Court also rejected the argument that self-sufficiency was the substantive standard, *id.* at 201 n.23. At best, then, the Sixth Circuit's otherwise innocuous dictum merely serves notice that the minority's meaningful-educational-benefit standard is in fact the first judicial step on the slippery slope toward a potential-maximizing standard.

In contrast to the minority-rule circuits, the opinions from the majority-rule circuits have carefully distinguished between *access* to, and the *benefit* from, education. See, *e.g.*, *A.B.*, 354 F.3d at 319 ("Under the act, the state must provide

children with 'meaningful access' to public education. The FAPE must only be 'calculated to confer *some* educational benefit on a disabled child.'" (citation omitted)). As the Eleventh Circuit has recognized, in *Rowley*, the adjective "meaningful" only modified the noun "access," *not* the educational "benefit." *JSK*, 941 F.2d at 1572 ("'Meaningful' only modified 'access.'").

Moreover, the fact that *Rowley* did not "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," 458 U.S. at 202, does not suggest, as some of the minority-rule courts have concluded, that courts are free to require a more demanding standard than the "some benefit" test. Rather, as the Eleventh Circuit explained, the *Rowley* Court "realiz[ed] that there could be no universal measure of 'some educational benefit,' [so] the Court confined itself to a case-specific analysis of the handicapped child." *JSK*, 941 F.2d at 1572. But that approach does not legitimate the court of appeals' decision here to impose a heightened standard of judicial review to the School System's proposed IEP.

B. The Minority Rule Implicates Important Policy Concerns for Public Education.

The minority rule espoused by the Sixth Circuit in the decision below raises fundamental policy concerns for public education. That rule improperly denigrates local educators' expertise, fosters an unworkable micromanagement of local educational policy by federal courts, and encourages more federal court litigation on educational issues.

In *Rowley*, this Court reaffirmed the principle that the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." 458 U.S. at 207. The Court recognized that "courts lack the

'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208. Accordingly, the Court was very careful to explain that the IDEA's "provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Rather, courts must give state administrative proceedings their "due weight." *Id.*

The "some educational benefit" standard protects the primary role of local officials in establishing educational policy, and prevents courts from overstepping their bounds and embroiling themselves in issues that require educational expertise they do not have. Indeed, whatever uncertainty or ambiguity may inhere in the deferential "some benefit" standard, any difficulties it has engendered pale in comparison to those that a heightened—and inescapably subjective—"meaningful benefit" standard will spawn. School officials have no way of determining whether a court will deem an IEP's educational benefit sufficiently "meaningful." Indeed, this case illustrates the potential for judicial second-guessing of good-faith educational decisions: the Sixth Circuit used its "meaningful benefit" standard to reject an educational plan that employed scientifically recognized teaching methods for autistic children, and a significant amount of speech and physical therapy. This 35-hour per week program indisputably would confer "some" educational benefit on children such as Zachary Deal. But educators such as petitioner cannot be sure, at the time they develop such an IEP, whether a court will consider those benefits sufficiently "meaningful" to make that program lawful.

The untoward consequences of such uncertainty are obvious and significant. The more stringent "meaningful educational benefit" standard will encourage dissatisfied

parents to file lawsuits predicated on the theory that IEPs are simply not good enough to deliver meaningful benefits. Unable to predict the outcome of such litigation, educators will be forced to practice a form of "defensive" education, yielding to the demands of those parents whose intransigence and resources suggest they are most likely to pursue litigation. Such practices will not serve the community's larger educational goals, and cannot be what Congress intended within the IDEA.

Finally, the minority rule implicates another, more structural concern of federalism. In *Rowley*, this Court repeatedly stressed that any substantive standard beyond "some educational benefit" would run afoul of the Spending Clause's "unambiguous" obligation requirement. *Id.* at 190 n.11 (explaining that "Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously"); *id.* at 204 n.26 (explaining that, "'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously'"). This limitation on congressional use of the Spending Clause emerges from the recognition that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the" federal funding. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Here, there is no "unambiguous" language in the IDEA that would imply that the States had "voluntarily and knowingly accept[ed] the terms of the [IDEA] 'contract,'" *id.*, thereby contractually obligating themselves to confer "meaningful educational benefits" on all disabled children. Instead, at most the States voluntarily and knowingly undertook the contractual obligation to provide "some educational benefit."

II. THE SIXTH CIRCUIT'S PREDETERMINATION RULING INAPPROPRIATELY ALLOWS PARENTS, RATHER THAN EXPERT EDUCATORS, TO DICTATE UNILATERALLY THEIR CHILDREN'S IEP PLACEMENTS.

Another aspect of the decision below exacerbates these policy concerns. The Sixth Circuit's predetermination ruling inappropriately allows parents, rather than expert educators, to dictate unilaterally their children's IEP placements. In *Rowley*, the Court had no doubt that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." 458 U.S. at 209. Nevertheless, the Court did not expect that parents could dictate unilaterally their children's IEP placements by inflexibly adopting hard bargaining positions. Instead, the Court envisioned a situation where parents would vigorously assert their children's rights, but not necessarily be entitled to receive whatever benefits they deemed appropriate. At the end of the day, the School System is entitled to make the final call so long as it provides some educational benefit.

Recently, this Court recognized the importance of determining, when a child's IEP is challenged, whether parents or school boards bear the burden of proof, by granting certiorari in *Schaffer* v. *Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698).[3] The Sixth Circuit's predetermination ruling below raises the closely related question of to what extent may school boards prepare draft proposals for IEP meetings and advocate for those proposals based on their educational expertise and their obligation to provide appropriate educations to *all* disabled children.

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[3] While the questions presented in this petition independently warrant the grant of certiorari, there is a substantial possibility that the Court may decide *Schaffer* in a way that sheds light on the propriety of the Sixth

The circuits that have considered the question of predetermination have concluded that, whenever parents are afforded a full opportunity to participate actively in IEP meetings, and are not simply presented with take-it-or-leave-it options, school systems cannot be said to have engaged in predetermination. *Fuhrmann ex rel. Fuhrmann* v. *East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993) ("there was clearly more than after the fact involvement here. The record indicates that the Fuhrmanns had an opportunity to participate in the IEP formulation process in a meaningful way"); *W.G.* v. *Board of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992) (holding a school system predetermined an IEP when it "assumed a 'take it or leave it' position at the meeting"); *Spielberg ex rel. Spielberg* v. *Henrico County Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988) ("After the fact involvement is not enough."); see also *Hanson ex rel. Hanson* v. *Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002) (no predetermination where parents were "given a full opportunity to participate in the formulation of the IEP"); *Doyle* v. *Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (no predetermination where parents "participated extensively in the IEP process"), *aff'd*, 39 F.3d 1176 (4th Cir. 1994) (unpublished table decision).

The Sixth Circuit had previously recognized these principles when it explained that "school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N.L. ex rel. Mrs. C.* v. *Knox County Schs.*, 315 F.3d 688, 694 (6th Cir. 2003). As a pure policy matter, it risks stating the obvious to observe that, "while a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement. *Doyle*, 806 F.

Circuit's predetermination ruling. In that event, pending the resolution of *Schaffer*, the Court may wish to hold this petition.

Supp. at 1262. In other words, "school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind." *Id.*

In the decision below, the Sixth Circuit improperly faulted school evaluators for diligently preparing for and vigorously advocating a position based on their educational expertise at an IEP meeting. The court of appeals found a procedural violation based on its view that the facts "*strongly suggest* that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program." Pet. App. 26a (emphasis added). But a predisposition to employ one scientifically recognized method rather than another, dramatically more expensive, method is not, and cannot be, impermissible predetermination.

Indeed, it is clear that the Sixth Circuit deemed it improper for petitioner to consider the expense of Lovaas-style ABA, particularly the expense of providing such therapy on a system-wide basis. Pet. App. 39a. But it is hardly inappropriate for educators working in a world of limited resources to consider the cost implications of a particular educational program for one student. It is clear from the record in this case that petitioner was prepared to make important accommodations and provide rigorous one-on-one opportunities for Zachary Deal. Though school officials may have been skeptical about the effectiveness of the ABA method, it is clear the Deals were absolutely unwilling to consider any other approach. To put the onus on the School System to compromise and allow the parents effectively to decide what is best for the child and thereby to expose the School System to the risk of having to pay for that educational preference poses a fundamental question about who gets to decide under the IDEA.

* * *

The implications of the two issues raised in this case are enormous. The IDEA affects hundreds of thousands of children and educators. In 2003, school systems served more than 6,725,000 children between the ages of 3 and 21 under the IDEA. U.S. Office of Special Educ. Programs, *Part B Annual Report* tbl.AA1 (July 31, 2004), *available at* http://www.ideadata.org/tables27th/ar_aa1.htm. In 2002, the educators employed to provide special education and related services numbered more than 430,000. *Id.* tbl.AC1, *available at* http://www.ideadata.org/tables27th/ar_ac1.htm; *id.* tbl.AC2, *available at* http://www.ideadata.org/tables27th/ar_ac2.htm. Just as the IDEA directly affects the lives of many families, children, and educators, it indirectly touches the lives of all Americans, by requiring the use of relatively scarce tax dollars to meet its mandates. In 2005 alone, the IDEA required the federal appropriation of nearly $12 billion. U.S. Dep't of Educ., *Fiscal Year 2006 Congressional Action* 9 (June 23, 2005), *available at* http://www.ed.gov/about/overview/budget/budget06/06action.pdf.

Requiring educators to satisfy an amorphous "meaningful benefit" standard, and treating their informed educational predispositions as violations of the IDEA's procedural requirements, will unduly tax local resources, inject federal courts into educational policy-making, and foster expensive and time-consuming litigation. These are consequences that Congress did not countenance in the IDEA and they are concerns that warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 03-5396

MAUREEN DEAL; PHILLIP DEAL, Parents,
On Behalf of ZACHARY DEAL,
Plaintiffs-Appellants,

v.

HAMILTON COUNTY BOARD OF EDUCATION,
Defendant-Appellee.

Argued: Aug. 12, 2004.
Decided and Filed: Dec. 16, 2004.
Rehearing En Banc Denied April 1, 2005.

BEFORE: MOORE and COLE, *Circuit Judges*; MARBLEY, *District Judge*.*

OPINION

MARBLEY, *District Judge.*

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. ("IDEA"), and corresponding Tennessee laws and rules. Plaintiffs-Appellants, Maureen and Phillip Deal (the "Deals"), bring this action for and on behalf of their autistic son, Zachary. Defendant-Appellee is the Board of Education of Hamilton

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* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

County, Tennessee (the "School System"). Plaintiffs-Appellants appeal the decision of the district court reversing in part and affirming in part the decision of the administrative law judge ("ALJ") who presided over the administrative hearing. Plaintiffs-Appellants assert that the School System failed to provide Zachary with a "free and appropriate public education" ("FAPE") in Zachary's "least restrictive environment" ("LRE") and that they therefore are entitled to reimbursement from the School System for the education that they provided Zachary at their own expense. The ALJ found several procedural and substantive violations of the IDEA and ordered the School System to pay some of the reimbursement sought by the Deals. The district court found no IDEA violations and reversed the reimbursement ordered by the ALJ. Based on the following analysis, the Court AFFIRMS in part and REVERSES in part.

I. BACKGROUND

A. Factual Background

In 1997, when Zachary was three years old, the School System and the Deals developed Zachary's first "individualized education program" ("IEP").[1] Pursuant to the terms of the IEP, Zachary attended a preschool comprehensive development class ("CDC") at Ooltewah Elementary School.

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[1] Zachary has been diagnosed with autism spectrum disorder, hereinafter referred to as "autism":

> "Autism" means a developmental disability, which significantly affects verbal and nonverbal communication and social interaction, generally evident before age three (3), that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

TN Bd. Educ. R. 0520-1-9-.01(15)(a). Zachary exhibits certain of the characteristics associated with autism, including deficits in communication and social interaction.

While Zachary was assigned to Ooltewah, his parents, in September 1997, began to teach Zachary outside of school using a program developed by the Center for Autism and Related Disorders ("CARD"). According to the ALJ, this program is patterned after a methodology for treating autistic children developed by Dr. Ivar Lovaas at the University of California at Los Angeles.[2] The CARD program consists of one-on-one applied behavioral analysis ("ABA") that relies heavily on extremely structured teaching and comprehensive data collection and analysis.

On May 11, 1998, an IEP team met to consider extended school year ("ESY") services for Zachary. The Deals, convinced that Zachary was making exceptional progress because of the one-on-one ABA program they were funding in their home, requested that the School System fund a 40-hour per week home based ABA program for the summer, as well as provide for year-round speech therapy. The School System refused to fund the parents' program and likewise refused to provide the Deals with data regarding the efficacy of the School System's approach to teaching autistic children. Instead, the agreed upon IEP provided for ESY services consisting of three 45 minute speech therapy sessions per week.

On October 9, 1998, an IEP meeting was held to develop Zachary's 1998-1999 IEP. The 95-page IEP, dated October 15, 1998, provided, among other things, for 35 hours per

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[2] Dr. Lovaas, in his seminal research conducted in the 1980s on methodologies for teaching autistic children, achieved extraordinary results. Virtually all students in his study group showed significant improvement, and his best outcome students exhibited dramatic gains in IQ and in their ability to function within a regular educational setting. A follow up study published in 1993 found that 47% of the students who had received Dr. Lovaas's intervention went on to become "indistinguishable" in their regular education classrooms. he [sic] ALJ found that Lovaas style interventions of ten hours per week or less have no effect.

week of special education instruction, with many explicit goals.[3] Zachary also was to receive related services, including physical therapy and speech therapy. The Deals filed a "minority report" requesting that the School System fund their private ABA program in the home. The School System convened additional IEP meetings that were attended by the Deals in November 1998, December 1998, February 1999, and March 1999 to discuss Zachary's progress and the Deals' concerns. During the 1998-1999 school year, Zachary attended the School System's program only 16% of the time.

At a May 24, 1999, IEP meeting, the Deals requested an ESY program of 43 hours per week of one-on-one ABA therapy and 5 hours per week of speech therapy. The IEP team determined that it could not document any regression Zachary would suffer without ESY services due to his lack of attendance at the School System's program, so the School System declined to offer any ESY services.

On August 20 and again on August 25, 1999, an IEP team met to develop an IEP for Zachary for the 1999-2000 school year. The School System proposed that Zachary would, in addition to his CDC classes, attend a regular kindergarten classroom three times per week for 15 minutes each. He would also have lunch with a regular kindergarten class. The time spent with the regular class would increase as Zachary was able to tolerate it. Zachary would have with him a classroom assistant familiar with and trained to meet his needs. The proposal included specific goals and objectives. Teaching methods would include one-on-one discrete trial teaching; the use of picture cues; incidental teaching to provide an opportunity for carry over and application of learned skills; continual use of functional communication techniques; activ-

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[3] The School System informed the Deals that several teaching methodologies would be utilized for Zachary, including discrete trial teaching, incidental teaching, activity-based learning, and structured teaching.

ity-based instruction; the use of music, story telling, and reading; and other techniques. The proposal also provided for speech and language therapy for 30 minutes five times per week, occupational therapy two times per month, and physical therapy for 30 minutes once a week.

On September 2, 1999, Zachary began attending a private preschool, the Primrose School, at which his parents had enrolled him. Zachary attended a regular pre-K class at the Primrose School for 3 hours per day, 2 days per week, with a personal aide paid for by the Deals. On September 7, 1999, the Deals informed the School System of their rejection of the IEP in favor of the private program. The Deals' disagreement with the IEP stemmed from their belief that Zachary should spend more time in a regular education classroom, as well as their desire to have the School System pay for the CARD program or offer similar ABA therapy. On September 16, 1999, the Deals requested a due process hearing under the provisions of the IDEA. Zachary did not attend public school at all during the 1999-2000 school year.

On August 11, 2000, an IEP meeting was held to develop an IEP for Zachary for the 2000-2001 school year. The proposed IEP called for Zachary to be placed primarily in a regular education kindergarten class at Westview Elementary School. The IEP included specific goals and objectives and provided for various support services, including pre-teaching and re-teaching sessions. The full school day and week program included related services of speech therapy and occupational therapy. The Deals rejected the IEP and continued to insist that the School System pay for their private ABA program for Zachary. Zachary did attend Westview that year, but only part time.

B. Procedural History

The administrative hearing requested by the Deals on September 16, 1999, began on March 15, 2000, and concluded on

February 13, 2001. The hearing encompassed 27 full days of testimony from 20 fact and expert witnesses. The ALJ also reviewed tens of thousands of pages of exhibits, viewed several video tapes, and personally observed Zachary in a number of settings.

In an opinion and order dated August 20, 2001, the ALJ made explicit credibility findings as to all 20 witnesses and provided 191 findings of fact. He also announced the following legal conclusions:

> (1) The School System violated the procedural requirements of the IDEA by predetermining, pursuant to an unofficial policy of refusing to consider "Lovaas style ABA," that the School System's extant program was appropriate for Zachary.[4]
>
> (2) The School System's failure to have regular education teachers attend the IEP team meetings also constituted a procedural violation.
>
> (3) These procedural violations themselves amounted to denial of a FAPE.

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[4] The ALJ concluded that the School System's refusal to offer Lovaas style ABA was based largely on cost considerations. Indeed, the School System had never funded an intensive Lovaas style ABA program, despite the dramatic difference in results between such a program and the standard School System program: under the strongest evidence offered by the School System, only 14% of autistic children receiving only the School System program went on to become "indistinguishable" from the children in regular education classrooms. School System representatives even acknowledged the effectiveness of Zachary's ABA program: one representative told the Deals that there were things she wished she could recommend for Zachary but then she would have to give them to everyone. The ALJ found that the School System should, at the very least, have informed the Deals about the Lovaas style of ABA and explained why it would recommend against such a program.

(4) The School System had substantively violated the IDEA by failing to provide a proven or even describable methodology for educating autistic children.[5]

(5) An additional substantive violation resulted from the School System's failure to provide Zachary with 30 hours per week of the intensive Lovaas style ABA that had been proven to be effective for him. [6]

(6) The School System also substantively violated the IDEA by failing to provide Zachary with ESY services in 1999.

(7) The Deals were not entitled to reimbursement for private evaluations of Zachary.

(8) The Deals were entitled to reimbursement for up to 30 hours per week of the home based ABA services they had provided to Zachary, and the School System was to continue to reimburse the Deals for such services until a

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[5] The School System methodology, described as an "eclectic" approach, involved the use of various components from other methodologies, primarily Treatment and Education of Autistic and Related Communication Handicapped Children ("TEACCH"). In his factual findings, the ALJ found TEACCH to be "a cradle to grave support system based on the assumption that the core clinical problems in autism are lifelong." The ALJ found TEACCH, a less expensive program than Lovaas style ABA, to be "a humane and effective methodology for addressing the needs of older autistic children and younger autistic children who have not shown or who are incapable of making the progress and IQ gains demonstrated by Lovaas style ABA." The ALJ credited the expert testimony of Dr. James A. Mulick, who stated that, out of almost 2,000 autistic children he had evaluated, the only ones he had seen who had become "indistinguishable" in a regular education setting were those who received intensive Lovaas style ABA.

[6] The ALJ described the "remarkable" progress that Zachary had achieved through the Lovaas style ABA and found that the continuation of such a program was appropriate because any other methodology would actually retard his education or development.

properly constituted IEP team, which must include at least one expert in and advocate for Lovaas style ABA, had developed an IEP for Zachary that included at least 30 hours per week of Lovaas style ABA.

(9) The School System did not sufficiently consider the LRE requirement of the IDEA in developing Zachary's 1999-2000 IEP, but the Deals nonetheless were not entitled to reimbursement for Zachary's tuition at the Primrose School because they failed to provide the School System with the required statutory notice.

(10) The School System had mishandled its obligation to provide the related services of physical therapy, occupational therapy, and speech therapy to Zachary and therefore was required to reimburse the Deals for any out of pocket costs they had incurred in providing such related services to Zachary.

(11) The Deals have no right to veto competent providers of services called for in a properly constituted IEP.

(12) Zachary Deal was the prevailing party.

On October 1, 2001, the Deals initiated review of portions of the ALJ's decision in the district court. They sought reimbursement of certain expenses that the ALJ had declined to award, as well as attorney's fees for the administrative hearing. The School System filed a counterclaim seeking reversal of the ALJ's determinations that the failure to offer Zachary a "Lovaas style" program violated Zachary's right to a FAPE and that the Deals were entitled to reimbursement for privately obtained related services.

On May 30, 2002, the School System requested that the district court hear additional evidence pursuant to the IDEA's "additional evidence" provision, 20 U.S.C. § 1415(i)(2)(B)(ii). By opinion and order dated August 16, 2002, the district court granted the School System's request to discovery and/or

submit testimony from 11 witnesses, including 4 expert witnesses who had not testified before the ALJ and who had had no dealings with the School System or Zachary until after the ALJ rendered his decision. The district court permitted discovery of the testimony of four additional witnesses who were able to provide knowledge of Zachary gained subsequent to the administrative hearing and three witnesses who had testified before the ALJ, though it cautioned the School System that it would only hear evidence limited to the issue before the court-whether the IEP proposed for the 1999-2000 school year was reasonably calculated to lead to educational benefits. The School System also received permission to submit Zachary's complete educational records as well as the complete records of Dr. Susan Speraw, the Deals' expert.

After a series of nationwide depositions and substantial additional document discovery conducted by the School System, the "additional evidence" trial was held on January 23 and 24, 2003. The district court heard testimony from two School System lay witnesses and four expert witnesses and received 24 exhibits into evidence. The Deals did not offer any additional evidence, despite the district court having indicated that they would be permitted to do so.

In an opinion and order dated March 4, 2003, the district court reversed in part and affirmed in part the ALJ's decision. The court ruled that there had been no procedural or substantive violations of the IDEA and that the Deals were not entitled to any reimbursement relief. The district court held that the ALJ had erred in exalting the Deals' preferred educational methodology above other appropriate methods. This appeal followed. Plaintiffs-Appellants argue that the district court erred by (1) allowing and relying upon Defendant-Appellee's additional evidence; (2) failing to take judicial notice of federal court filings challenging the credibility of one of Defendant-Appellee's experts; (3) reversing those aspects of the ALJ's decision that found violations of the IDEA and granted

reimbursement to Plaintiffs-Appellants; and (4) awarding costs to Defendant-Appellee.

II. STANDARD OF REVIEW

In an IDEA action, the district court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B). The Supreme Court has construed this provision to mean that an initial reviewing court should make an independent decision based on the preponderance of the evidence but also should give "due weight" to the determinations made during the state administrative process. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Although reviewing courts must not "simply adopt the state administrative findings without an independent re-examination of the evidence," *Doe ex rel. Doe v. Metropolitan Nashville Public Schools,* 133 F.3d 384, 387 (6th Cir.1998), neither may they "substitute their own notions of sound educational policy for those of the school authorities which they review," *Thomas v. Cincinnati Board of Education,* 918 F.2d 618, 624 (6th Cir.1990) (quoting *Rowley,* 458 U.S. at 206, 102 S.Ct. 3034). The amount of weight due to administrative findings depends on whether the finding is based on educational expertise. *McLaughlin v. Holt Pub. Sch. Bd. of Educ.,* 320 F.3d 663, 669 (6th Cir.2003). "Less weight is due to an agency's determinations on matters for which educational expertise is not relevant because a federal court is just as well suited to evaluate the situation." *Id.* "More weight, however, is due to an agency's determinations on matters for which educational expertise is relevant." *Id.*

According to this "modified de novo" standard of review, "a district court is required to make findings of fact based on a preponderance of the evidence contained in the complete

record, while giving some deference to the fact findings of the administrative proceedings." *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir.2001). This Court, in turn, applies a clearly erroneous standard of review to the district court's findings of fact and a de novo standard of review to its conclusions of law. *Id.* Mixed questions of law and fact, including the question of whether a child was denied a FAPE, are reviewed de novo. *Id.* at 766 (citing *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503 (6th Cir.1998), and *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992)). This Court also must accord due deference to the state administrative hearing officer's decision. *McLaughlin*, 320 F.3d at 669.

A district court's decision regarding additional evidence in an IDEA case will be reviewed for abuse of discretion. *Knable*, 238 F.3d at 772 (citing *Metro. Gov't v. Cook*, 915 F.2d 232, 234 (6th Cir.1990)). A district court's refusal to take judicial notice likewise will be reviewed for abuse of discretion. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir.2002). An award of costs to a prevailing party also is considered under an abuse of discretion standard. *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 591 (6th Cir.2004).

III. DISCUSSION

A. Additional Evidence

This Court has taken an expansive view of the scope of additional evidence that may supplement the administrative record. *See, e.g., Metro. Bd. of Pub. Educ., Metro. Gov't v. Guest ex rel. Guest*, 193 F.3d 457, 463 (6th Cir.1999); *Cook*, 915 F.2d at 234. This Court has declined to adopt the narrow position of other circuits "that additional evidence is admissible only in limited circumstances, such as to supplement or fill in the gaps in the evidence previously introduced." *Cook*,

915 F.2d at 234 (rejecting central holding of *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (1st Cir.1984), *aff'd on other grounds*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). Rather, "'[a]dditional,' in its ordinary usage, implies something that is added, or something that exists by way of addition. To 'add' means to join or unite; the limitation on what can be joined inherent in the term 'supplement' is not present in the term 'add.'" *Id.* While the determination of which additional evidence to allow rests within the sound discretion of the district court, *Knable*, 238 F.3d at 772, the court should take care to limit additional evidence to what is necessary for consideration of whether the original IEP was reasonably calculated to afford some educational benefit. *Guest*, 193 F.3d at 463 (finding that the district court exceeded its jurisdiction to the extent it used additional evidence to rule upon issues beyond those presented to the ALJ).

Here, Plaintiffs-Appellants have not given this Court any basis for concluding that the district court abused its discretion in permitting (1) the testimony of four additional expert witnesses who addressed the Lovaas study and accepted principles for educating autistic students; (2) the testimony of two additional fact witnesses who had worked with Zachary in the 2001-2002 school year, limited in scope to the extent to which their observations were relevant to the challenged decisions for the 1999-2000 school year; or (3) the introduction of new documentary evidence, consisting of the *curricula vitae* of the expert witnesses who testified, records regarding Zachary's educational progress, and the results of psychological evaluations conducted by certain experts. There is no evidence, for example, that the district court used the additional evidence to go beyond the scope of the matters before the ALJ; indeed, the district court took great care to limit testimony to matters relevant to the 1999-2000 IEP.

Plaintiffs' main argument seems to be that, under the *Burlington* factors, the allowance of so much additional

evidence was simply unfair. This Court, however, has rejected the narrowness of the *Burlington* analysis, choosing instead to give great latitude to district courts, and has recognized that additional expert testimony, in particular, might be especially helpful to district courts.[7] *Cook*, 915 F.2d at 234. There is no prohibition, in either the statute or the case law of this Circuit, against the district court allowing even a large amount of additional evidence if it will add something to the administrative record or assist the court in deciding the issues before it.[8] *See* 20 U.S.C. § 1415(i)(2)(B) (stating that the district court "shall hear additional evidence at the request of a party"). This Court therefore AFFIRMS the district court's allowance of additional evidence.

Plaintiffs-Appellants also contend that the district court failed to exercise its "gatekeeper" function under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), by allowing allegedly unreliable expert testimony. In particular, Plaintiffs-Appellants attack the district

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[7] Plaintiffs-Appellants cite to *Knable*, where this Court upheld a district court's refusal to allow into evidence the deposition testimony of a psychologist in part because the testimony was developed after the administrative hearing. *Knable*, 238 F.3d at 771-72. What Plaintiffs-Appellants do not mention is that the district court in *Knable* had also found the proffered testimony to be duplicative of evidence presented at the administrative hearing, *id.* at 771, whereas here, the district court took pains to avoid repetitive testimony. Regardless, *Knable* does not control this case because the Court in *Knable* merely held that the district court had not abused its discretion. *Id.* at 772.

[8] A district court could, of course, be found to have abused its discretion if it allowed additional evidence "to change the character [of] the hearing from one of review to a trial *de novo*" or if, for example, one party unfairly reserved its best evidence for trial. *Cook*, 915 F.2d at 234-35 (quoting *Burlington*, 736 F.2d at 791). There is no evidence, however, that such was the case here.

court's failure to exclude the "plainly erroneous" testimony of Dr. David Rostetter and the "after-the-fact" testimony of Dr. B.J. Freeman. Plaintiffs-Appellants provide no legal arguments, however, and instead argue facts going to the witnesses' credibility: they contend that the district court gave undue weight to the testimony of Dr. Rostetter and, to a lesser extent, Dr. Freeman. *But see Daubert*, 509 U.S. at 596, 113 S.Ct. 2786 ("Vigorous cross-examination [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence.").

In *Daubert*, the Supreme Court held that district courts must act as "gatekeepers" to protect juries from misleading or unreliable expert testimony by assessing the reliability of the expert's principles and methodologies used to reach the expert opinion or conclusion. *Daubert*, 509 U.S. at 589, 592-93, 113 S.Ct. 2786. Factors to be considered in assessing reliability include whether the expert's theory may be tested or refuted, the degree of acceptance of the theory or technique within the relevant community, and whether the theory has been a subject of peer review or publication. *Id.* at 593-94, 113 S.Ct. 2786.

The problems with Plaintiffs-Appellants' argument are manifold. The "gatekeeper" doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial. Furthermore, this Court is not in the business of dictating to district courts the amount of weight they must give to certain expert opinions. Plaintiffs-Appellants simply have not demonstrated either that the district court abused its discretion by hearing this testimony, *General Electric Co. v. Joiner*, 522 U.S. 136, 138-39, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), or that any of the district court's factual findings based upon these expert opinions were clearly erroneous, *Knable*, 238

F.3d at 764.[9] Even if this Court were to analyze the admissibility of Dr. Rostetter's and Dr. Freeman's testimony under the *Daubert* factors, the testimony readily would meet the threshold for admissibility. Dr. Rostetter is a nationally recognized expert in the field of IDEA compliance who has published and presented extensively in the field, who assisted in drafting the original IDEA regulations, and who has served as a court appointed and court approved expert in numerous IDEA cases throughout the country. With respect to Dr. Freeman, the mere fact that she was not involved in the case until after the ALJ's decision was entered is not determinative on the issue of the admissibility of her testimony. *See, e.g., Guest,* 193 F.3d at 463 (finding after the fact evidence to be admissible in IDEA cases as long as it is helpful in determining the validity of the original IEP). In sum, this Court will not disturb the district court's decision to admit the testimony of the School System's experts.

B. Judicial Notice

Plaintiffs-Appellants sought to have the district court take judicial notice, pursuant to Federal Rule of Evidence 201,[10] of

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[9] Indeed, Plaintiffs-Appellants are not able to point to any real reliance by the district court on the opinions of these experts. Dr. Rostetter, for example, is mentioned only once in the district court's opinion. Plaintiffs-Appellants express particular concern that the district court relied on and applied the "unprecedented and impermissibly low standard" articulated by Dr. Rostetter. According to the Deals, Dr. Rostetter urged the district court to assess the School System's conduct based on "standards of acceptable practice," *i.e.*, what other school districts do. There is no evidence, however, that the district court utilized any such standard.

[10] Federal Rule of Evidence 201 reads, in pertinent part, as follows:

> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of

declarations filed by Dr. Rostetter in an unrelated California case that allegedly "strongly suggest that the positions Dr. Rostetter advances can turn on which party is paying his bill." Defendant-Appellee argues that Plaintiffs-Appellants confuse a district court's determination of a witness's credibility with judicial notice of adjudicative facts.

In *United States v. Bonds*, 12 F.3d 540 (6th Cir.1993), this Court refused to take judicial notice of a National Research Committee report:

> While defendants' request that we merely take judicial notice of this report pursuant to Federal Rules of Evidence 201(f) and 104(a) has a certain facial appeal, Federal Rule 201 permits a court to take judicial notice only of facts "not subject to reasonable dispute . . . ." Fed.R.Evid. 201(b). There is no dispute that the [report] exists, but there is considerable dispute over the significance of its contents.

Bonds, 12 F.3d at 553 (footnotes omitted); *see also United States v. Collier*, 68 Fed.App. 676, 2003 U.S.App. LEXIS 13629, at *16 (6th Cir. July 2, 2003) (finding no error in district court's refusal to take judicial notice of bankruptcy court judgment beyond acknowledgment that proceeding had occurred), *cert. denied*, 540 U.S. 1126, 124 S.Ct. 1094, 157 L.Ed.2d 927 (2004).

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accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

. . . .

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Although Rule 201 is phrased in mandatory language, courts of appeals review a district court's refusal to take judicial notice for abuse of discretion. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir.2002).

Here, too, there is no dispute that the California proceeding occurred or that the declarations in that case existed. The Deals, however, essentially were attempting to get the district court to take judicial notice of Dr. Rostetter's lack of credibility, a fact that is very much in dispute. The proper use of the allegedly contradictory declarations was in cross-examination of Dr. Rostetter, and, indeed, Plaintiffs-Appellants did cross-examine Dr. Rostetter about the California litigation. There was no abuse of discretion in the district court's refusal to take judicial notice of the declarations. That decision therefore is AFFIRMED.

C. Violations of the IDEA

1. Standards Under the IDEA

The purpose of the IDEA is to give children with disabilities a free appropriate public education designed to meet their unique needs.[11] *Burilovich ex rel. Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch.*, 208 F.3d 560, 565 (6th

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[11] The term "free appropriate public education" is defined in the IDEA as follows:

> The term "free appropriate public education" means special education and related services that—
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> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(8). According to the Supreme Court, a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Cir.2000) (citing 20 U.S.C. §§ 1401(25), 1412). As part of providing a FAPE, school districts receiving funds under the IDEA are required to establish an IEP for each child with a disability. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 762 (6th Cir.2001) (citing 20 U.S.C. § 1414(a)(5)). The IEP must "contain a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress." *Id.* at 763 (citing 20 U.S.C. § 1401(a)(20)).

There are two parts to a court's inquiry in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir.2003). Second, the court must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034; *McLaughlin*, 320 F.3d at 669. "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034; *accord Kings Local Sch. Dist., Bd. of Educ. v. Zelazny*, 325 F.3d 724, 729 (6th Cir.2003). Parties challenging an IEP have the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate. *Zelazny*, 325 F.3d at 729; *Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch.*, 197 F.3d 793, 799 (6th Cir.1999).

With regard to procedural matters, a court should "strictly review an IEP for procedural compliance," although technical deviations will not render an IEP invalid. *Dong*, 197 F.3d at 800; *see Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss ex rel. Boss*, 144 F.3d 391, 398 (6th Cir.1998) (noting

that "minor technical violations may be excused"). A finding of procedural violations does not necessarily entitle appellants to relief. *Knable*, 238 F.3d at 764. Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of a FAPE, may relief be granted. *Id.* The Supreme Court has emphasized the importance Congress attached to the IDEA's procedural safeguards:

> [T]he congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 206, 102 S.Ct. 3034. "If the procedural requirements of the IDEA are met, greater deference is to be afforded to the district's placement decision." *Dong*, 197 F.3d at 800.

As for substantive compliance, "[t]he 'preponderance of the evidence' language in the [IDEA] 'is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir.1990) (quoting *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034). The Supreme Court has cautioned,

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs,

> was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

Rowley, 458 U.S. at 207, 102 S.Ct. 3034 (footnote omitted). "Indeed, federal courts are generalists with no expertise in the educational needs of handicapped children and will benefit from the factfinding of a state agency, which is presumed to have expertise in the field." *Burilovich*, 208 F.3d at 566.

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-01, 102 S.Ct. 3034. The Court explicitly rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id.* at 198, 102 S.Ct. 3034 (internal citation omitted) (finding no congressional intent to achieve strict equality of opportunity or services); *see Renner v. Bd. of Educ. of the Pub. Sch.*, 185 F.3d 635, 644 (6th Cir.1999).

Parents may receive retroactive reimbursement for private educational services they unilaterally provide to their child in certain circumstances. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Knable*, 238 F.3d at 763. Parents are entitled to such reimbursement if a court concludes both that the public placement violated the IDEA and that the private placement

was proper under the IDEA. *Florence County Sch. Dist. Four v. Carter ex rel. Carter,* 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *Knable,* 238 F.3d at 763. A private placement is proper under the IDEA if the education provided in the private placement is reasonably calculated to enable the child to receive educational benefits. *Knable,* 238 F.3d at 770 (citing *Florence County,* 510 U.S. at 11, 114 S.Ct. 361).

2. Procedural Violations

a. Predetermination

The ALJ found that the School System "clearly" had an unofficial policy of refusing to consider Lovaas style ABA for autistic children and that School System personnel consistently attended IEP meetings having "pre-selected" the extant School System program regardless of Zachary's demonstrated individual needs. The ALJ's conclusion of predetermination was based on the following findings of fact:

> 24. Ms. Jane Dixon, an HCDE Special Education Supervisor, met with Mrs. Deal on May 19, 1997 and at the meeting she discussed programs available for autistic children without mentioning the Lovaas style ABA as a methodology for the parents to explore.
>
> . . . .
>
> 56. At the May 11, 1998 IEP meeting, Sandra Jerardi told the Deals that there were certain things she would like to give (Zachary) but that she could not because she could not give the same service to everybody.
>
> . . . .
>
> 63. The HCDE has consistently rejected providing Lovaas style ABA services to Zachary or any other student in their system....
>
> . . . .

85. HCDE rejects the validity of the Lovaas study and its results and embraces the position of the professionals in the field who have published articles critical of the Lovaas style ABA approach to treating children with autism.

. . . .

105. Jane Dixon told the Deals that they could not ask questions during the March 3, 1999 IEP meeting.

. . . .

111. Ms. Dixon investigated Zachary's parents' dispute with the IEP and interviewed various teachers and providers without interviewing any of the ABA providers even though Lovaas style ABA formed the bulk of Zachary's educational program at that time.

112. HCDE denied the Deal's request for Lovaas style ABA for Zachary in part because HCDE believes it is more expensive than HCDE's current approach.

. . . .

126. *Prior* to the Deals requesting funding for Zachary's ABA program from the HCDE, Ms. Sandra Jerardi authored an internal memo in which she described Zachary's program under IDEA as a "sensitive case with regards to school program and/or Lovaas."

127. Based on other testimony in the record supporting the proposition that the HCDE rejects meaningful consideration of the Lovaas style ABA intervention at least in large part because of its perceived cost, the court finds that Ms. Jerardi was flagging Zachary Deal's education program as sensitive because of its probable cost and adverse impact on the HCDE policy of rejecting any and all requests for Lovaas style ABA for young autistic children.

128. At the May 11, 1998 IEP meeting, the Deals outlined the impressive results Zachary had achieved with the Lovaas style ABA methodology and asked the HCDE to fund a continuation of the program over the summer.

129. HCDE personnel informed the Deals that "the powers that be" were not implementing ABA programs.

130. Ms. Jerardi, an HCDE representative and IEP team member in the May 11, 1998 IEP team meeting told the Deals that she wished people would pay their taxes so that HCDE could provide ABA for Zachary.

. . . .

156. Jane Dixon believes that the parents' proposed goal to make Zachary independent in society with as normal a life as possible is unrealistic.

157. HCDE has a policy of not considering Lovaas style ABA for autistic children. Sandra Jerardi admits to being impressed by Zachary's present levels of performance yet steadfastly refuses to give any credit to Zachary's intensive Lovaas style ABA program for these achievements. Ms. Jerardi refuses to concede that any progress is attributable to the ABA program even when the progress was obtained over the course of a summer in which the school system provided no services.

. . . .

174. HCDE refused the Deal's offer to help train HCDE personnel on Zachary's ABA program and protocols.

J.A. at 37-49 (citations to administrative hearing record omitted).[12]

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[12] The Deals point to two additional pieces of evidence that they claim support a finding of predetermination. First, Donna Palmer, a School System psychologist, testified at the administrative hearing regarding her

The district court did not explicitly reject any of the ALJ's findings of fact on the issue of predetermination. Relying on *Ms. C. ex rel. N.L. v. Knox County Schools,* 315 F.3d 688 (6th Cir.2003), the court simply concluded that "[t]he facts of this case do not add up to predetermination on the part of HCDE." The court found persuasive the fact that the Deals were present at every IEP meeting convened and at every meeting took the opportunity "to forcefully advocate their position." The court stated,

> HCDE could come to IEP meetings with pre-formed opinions regarding the best course of action for Zachary so long as school officials were willing to listen to the Deals, and the Deals had the opportunity to make objections and suggestions. . . . There is nothing in IDEA which requires school systems to accept the parents' point of view, or suffer a procedural violation of the statute.

This Court's review of the predetermination decision is de novo, since it is a mixed question of law and fact. *See Knable ex rel. Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 766 (6th Cir.2001). The evidence reveals that the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived Zachary's parents of meaningful participation in the

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familiarity with a publication entitled, "How to Avoid Parents' Demands for Lovaas." Second, a letter from the School System's counsel regarding, *inter alia,* the representation in the Deals' administrative hearing stated, "I previously briefed the Board in executive session regarding this litigation and its importance to the system and received its backing in our proposal to defend this litigation vigorously." The Deals contend that this statement is compelling evidence that the School System is being driven by its fear of this case setting a precedent that will require it to provide similar ABA services to other autistic children.

IEP process, the predetermination caused substantive harm and therefore deprived Zachary of a FAPE.

The leading case on predetermination is *Spielberg ex rel. Spielberg v. Henrico County Public Schools,* 853 F.2d 256 (4th Cir.1988). There, the district court had concluded, based on a series of letters written before the IEP meeting that focused on a change in placement, that the school district had decided to change the disabled student's placement before developing an IEP to support the change. *Id.* at 258-59. The Fourth Circuit affirmed the district court's determination that a procedural violation had occurred that deprived the student of a FAPE:

> Under the EHA [the predecessor to the IDEA], the general rule is that placement should be based on the IEP. 34 C.F.R. § 300.552. The appendix interpreting the EHA regulations states that "IEP objectives must be written before placement." 34 C.F.R. Part 300, App. C., Question 42. The decision to place Jonathan at Randolph before developing an IEP on which to base that placement violates this regulation as interpreted by the Secretary of Education. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough.

Id. at 259 (footnote omitted). The relevant regulation provides that, in determining the educational placement of a disabled child, the public agency must ensure that the placement "[i]s based on the child's IEP." 34 C.F.R. § 300.552.

W.G. v. Board of Trustees of Target Range School District No. 23, 960 F.2d 1479 (9th Cir.1992), was a similar case. There, the Ninth Circuit agreed with the district court that the school district had independently developed a proposed IEP that would place the student in a preexisting, predetermined program. *Id.* at 1484. At the IEP meeting, no alternatives to that program were considered. *Id.* The court held that in order

to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a *meaningful* IEP meeting. *Id.* at 1485.

Courts often have declined to find predetermination; however, such cases are distinguishable from the case sub judice. *See, e.g., Knox County Sch.*, 315 F.3d at 694-95 (finding no predetermination where parent was not involved in initial, ex parte determination of eligibility but was active participant in final determination); *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir.1993) (finding parents had opportunity to participate in IEP formulation in meaningful way); *Hanson ex rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D.Md.2002) (noting credible evidence that school board came to IEP meetings with open mind, and that several options were discussed and considered before final recommendation was made); *Doyle v. Arlington County Sch. Bd.*, 806 F.Supp. 1253, 1262 (E.D.Va.1992) (holding that school system had merely proposed a placement before IEP was completed and had not "fully made up its mind before the parents ever [got] involved," thereby denying the parents "the opportunity for meaningful input"), *aff'd*, 39 F.3d 1176 (4th Cir.1994). In *Knox County Schools*, this Court emphasized that school officials are permitted to form opinions and compile reports prior to IEP meetings. *Knox County Sch.*, 315 F.3d at 693-94 n. 3. The Court cautioned, however, that such conduct is only harmless as long as school officials are "willing to listen to the parents." *Id.* at 694-95 (noting that school system representatives should "come to the meeting with suggestions and open minds, not a required course of action").

The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program. This conclusion is bolstered by

evidence that the School System steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results. Indeed, School System personnel openly admired and were impressed with Zachary's performance (presumably attained through the ABA program), until the Deals asked the School System to pay for the ABA program.[13] Several comments made by School System personnel suggested that they would like to provide Zachary with ABA services, *i.e.*, they recognized the efficacy of such a program, but they were prevented from doing so, *i.e.*, by the School System policy. The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

The district court erred in assuming that merely because the Deals were present and spoke at the various IEP meetings, they were afforded adequate opportunity to participate. Participation must be more than a mere form; it must be *meaningful*. *W.G.*, 960 F.2d at 1485; *see also Knox County Sch.*, 315 F.3d at 694-95 (stating that school officials must be willing to listen to the parents and must have open minds). Despite the protestations of the Deals, the School System never even treated a one-on-one ABA program as a viable option. Where there was no way that anything the Deals said, or any data the Deals produced, could have changed the

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[13] As discussed in depth by the ALJ, the Deals' preference for the CARD program over the School System program was not the result of a mere dispute over educational methodology but, rather, was based on extensive data regarding Zachary's progress under the CARD program. Zachary exhibited significant IQ gains, as well as practical improvement in daily tasks. One of the School System's experts, Dr. Taubman, testified before the district court that after reviewing numerous boxes of data on Zachary's progress, he was unable to point to a single error or inaccuracy.

School System's determination of appropriate services, their participation was no more than after the fact involvement. *See Spielberg*, 853 F.2d at 259.

The School System noted, at oral argument, that the Deals' participation in the IEP process is evidenced by their contributions to the descriptions of Zachary's present levels of performance and to the stated goals and objectives contained within the IEPs. The School System was unable to point to any evidence, however, that the Deals contributed to the operative portions of the IEP—that their opinions were considered in determining the services that would be provided to Zachary. In short, nothing offered by the School System suffices to surmount the Golconda of circumstantial evidence adduced by Plaintiffs-Appellants to establish the existence of an unofficial School System policy of rejecting any requests for an intensive, one-on-one ABA program. This evidence includes the internal memorandum by Sandra Jerardi flagging Zachary's education program as a "sensitive case with regards to school program and/or Lovaas," as well as various comments from School System personnel, including a statement that "the powers that be" were not funding ABA programs.

The School System seemed to suggest, at oral argument, that it is entitled to invest in a program such as TEACCH and then capitalize on that investment by using the TEACCH program exclusively. But this is precisely what it is *not* permitted to do, at least without fully considering the individual needs of each child. A school district unquestionably may consider cost in determining appropriate services for a child. *E.g., Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516-17 (6th Cir.1984). The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always

going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child.* A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account. *See Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 177 (3d Cir.1988) (noting that the "system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's 'unique needs'") (quoting 20 U.S.C. § 1401(16)). A "one size fits all" approach to special education will not be countenanced by the IDEA.

A procedural violation can cause substantive harm when it seriously infringes upon the parents' opportunity to participate in the IEP process. *Knable,* 238 F.3d at 765; *see also Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 208, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ("Congress sought to protect individual children by providing for parental involvement . . . in the formulation of the child's individual educational program."). Because the School System deprived the Deals of a meaningful opportunity to participate, the predetermination amounts to denial of a FAPE for Zachary. The Court accordingly REVERSES the district court's decision on this basis.

b. Presence of Regular Education Teachers at IEP Meetings

The ALJ found (1) that no regular education teacher attended the February 19, 1999, IEP meeting; (2) that no regular education teacher *of Zachary's* attended the October 15, 1998, IEP team meeting "even though it was clear that whether or not it would be appropriate for Zachary to participate in the regular education setting would be a subject of the meeting"; (3) that the regular education teacher who

attended the August 25, 1999, meeting left before the 1999-2000 goals and objectives were developed and before the issue of placement was decided; and (4) that no regular education teacher attended the August 20, 1999, IEP meeting. The ALJ found that the failure of the School System to have regular education teachers attend the IEP meetings was a "troubling procedural violation," as well as "strong evidence that the decision to place Zachary in a special education classroom for the 1999-2000 school year had been made before the IEP team convened."

The district court erroneously stated that "the ALJ's findings only catalog two IEP meetings (October 1998 and February 1999) where a regular school teacher was not present." The district court then explained that the absence of a regular school teacher at these two meetings did not cause substantive harm to Zachary or his parents and thus did not deny Zachary a FAPE:

> In October 1998, Zachary was four years old. He would not have been attending regular school during the 1998-1999 school year because he had not reached age five. It is difficult to see what meaningful contribution a regular school teacher could have made to this meeting. The February 1999 IEP meeting was held at a time when the IEP for the 1999-2000 school year had long been formulated, and during a time when Zachary was not even attending an HCDE school. Again, it risks stating the obvious to conclude that this had no effect on the welfare of Zachary or the Deals.

A school district is required to "ensure that the IEP team for each child with a disability includes . . . [a]t least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)." 34 C.F.R. § 300.344(a). There appears to be no dispute that the School System technically violated the IDEA by failing to include regular education teachers at certain IEP meetings.

The question is whether these violations caused substantive harm to either Zachary or his parents. There is little case law directly on point.[14] The Supreme Court clearly recognized the importance of the IDEA's procedural requirements in ensuring that a disabled student receives a FAPE. *See Rowley*, 458 U.S. at 206, 102 S.Ct. 3034 ("[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."). The Court is mindful, however, that mere "technical deviations" do not render an IEP invalid. *Dong*, 197 F.3d at 800.

The district court unaccountably failed to consider the violations relating to the two August 1999 meetings—the meetings at which the 1999-2000 IEP that is the subject of this lawsuit was prepared. The Court agrees that the School System's failure to ensure the attendance of regular education teachers at the October 1998 and February 1999 meetings did not cause substantive harm. The very purpose of this requirement is implicated, however, by the August 1999 failures. The rationale for requiring the attendance of a regular education teacher is closely tied to Congress's "least restrictive environment" mandate. The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom. One of the Deals' main objections to the 1999-2000 IEP developed for Zachary is that it did not provide for sufficient integration. The absence of the unique perspective that could have been provided by a regular education teacher therefore had a real

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[14] In *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1484-85 (9th Cir.1992), the court pointed to the school district's failure to obtain any input or participation from the student's regular classroom teacher as one aspect of the school district's serious procedural violations.

impact on the decision-making process.[15] The Court therefore REVERSES the district court's decision based on this procedural violation, as well.

3. Substantive Violations

The ALJ held that the School System had denied Zachary a FAPE by offering its standard, "eclectic" program for teaching autistic children rather than 30 hours per week of "Lovaas style ABA." The ALJ cited to extensive evidence tending to suggest that the approach offered by the School System provides little or no chance of self-sufficiency for an autistic child while, under the Lovaas approach, self-sufficiency is a real possibility. The district court found that it could not conclude that the private school placement and ABA services provided by the Deals were inappropriate, but that the proper focus was on the program offered by the School System. The court determined that there are a number of effective ways to deal with autism, and that the School System's program utilized an acceptable methodology.

Defendant-Appellant argues that the ALJ improperly shifted the burden of proof by requiring it to prove that its program was better than what was provided by the Deals and that the ALJ misapprehended the Lovaas study and failed to comprehend that the School System's program was consistent with best practices in the field.

The district court had the benefit of testimony from four experts offered by the School System to correct the ALJ's alleged misapprehensions. As a result, the ALJ and the district court ultimately took different views of the facts.

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[15] Defendant-Appellant's argument that the school principal and others familiar with the regular education program were present at these meetings misses the mark. The regulation explicitly requires the attendance of a "regular education teacher of the child." 34 C.F.R. § 300.344(a). The regulation does not state an exception where other knowledgeable people are present.

Their respective opinions, however, evince a fundamental legal disagreement regarding the level of education that must be provided to a disabled child.

The facile answer to the question raised by this disagreement is that a school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit. *Doe ex rel. Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir.1989). This Court and others faced with essentially the same question have decided that school systems are not required to provide autistic children with the sort of intensive (and expensive) educational program pioneered by Dr. Lovaas. *Burilovich ex rel Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch.*, 208 F.3d 560 (6th Cir.2000) ("Lovaas-style" discrete trial training vs. mainstream kindergarten); *Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch.*, 197 F.3d 793 (6th Cir.1999) ("Lovaas intervention method" vs. TEACCH); *Adams ex rel. Adams v. Oregon*, 195 F.3d 1141 (9th Cir.1999) (early intervention services consisting of 40 hours per week of "Lovaas-type discrete trial training" vs. 12.5 hour school program incorporating that and other methodologies); *Renner v. Bd. of Educ. of the Pub. Sch.*, 185 F.3d 635 (6th Cir.1999) (40 hours per week of one-on-one discrete trial training vs. school based program including some discrete trial training); *Popson ex rel. J.P. v. W. Clark Cmty. Sch.*, 230 F.Supp.2d 910 (S.D.Ind.2002) (Lovaas based "ABA/DTT program" vs. "eclectic approach").

At some point, however, this facile answer becomes insufficient. Indeed, there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to denial of a FAPE. A school district clearly is not required to "maximize each child's potential commensurate with the opportunity provided other children," *Rowley*, 458 U.S. at 198, 102 S.Ct. 3034 (internal citation omitted), *i.e.*, to provide all children with

equal educational opportunity. The Third Circuit, however, has held that an IEP must confer a "*meaningful* educational benefit." *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir.2000) (citing *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir.1988), and *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir.1999)). Further, that benefit "must be gauged in relation to a child's potential." *Kingwood*, 205 F.3d at 578 (quoting *Ridgewood*, 172 F.3d at 247). Based on the analysis set forth below, we agree that the IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue.

In *Polk*, the issue was the provision of physical therapy as a "related service." Rather than providing direct physical therapy from a licensed physical therapist, the school district shifted to a "consultative" model whereby a physical therapist did not provide any therapy directly, but instead trained the classroom teacher to integrate physical therapy with the disabled student's education. *Polk*, 853 F.2d at 173-74. The parents alleged that the failure to provide direct physical therapy at least once a week had hindered their child's progress in meeting his educational goals. *Id.* at 172. The Third Circuit first held that there was a genuine issue of material fact regarding whether the defendants had failed to provide *individualized* educational programs due to their refusal, as a blanket rule, even to consider providing handicapped students with direct physical therapy from a licensed therapist. *Id.* The court next concluded that the lower court had erred in evaluating the disabled child's educational program by a standard under which even trivial educational advancement could satisfy the substantive requirements of the statute. *Id.*

The court held that a FAPE must provide "more than a trivial educational benefit." *Id.* at 180. Noting that *Rowley* was a narrow decision and that the precise issue of how much

educational benefit must be provided had not been squarely before the Court in that case, the *Polk* court relied on *Rowley*'s use of the word "meaningful," as well as legislative history emphasizing the importance of self-sufficiency, to find that the educational benefit must be more than *de minimis*. *Id.* at 179-82 (noting that Congress must have contemplated "significant learning" in special education classrooms). The court chose to read expansively its previous decision in *Board of Education v. Diamond*, 808 F.2d 987, 991 (3d Cir.1986), in which it had rejected the argument that when the *Rowley* Court referred to "some benefit," it meant any benefit at all, even if the child nevertheless regressed. *Polk* at 183.

Later Third Circuit cases have affirmed that IEPs must be tailored to provide a meaningful benefit. For example, in *Ridgewood*, the court held that a mere finding that an IEP had provided "more than a trivial educational benefit" was insufficient to establish that the IDEA's standards had been met. *Ridgewood*, 172 F.3d at 247-48. The court found that because the benefit provided "must be gauged in relation to a child's potential," *Polk* at 185, the determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood* at 248. The *Kingwood* court, in turn, emphasized that the educational benefit must be "*meaningful*," and acknowledged that a district court must "analyze the type and amount of learning" of which a student is capable in order to determine how much of an educational benefit must be provided. *Kingwood*, 205 F.3d at 577-78 (quoting *Ridgewood*, 172 F.3d at 248).

Rowley is the only Supreme Court decision to have addressed the level of educational benefit that must be provided pursuant to an IEP. Nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit; indeed, the legislative history cited in *Rowley* provides strong support for a higher standard in a case

such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence. As noted by the Third Circuit, "*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a 'mainstreamed' classroom." *Polk*, 853 F.2d at 180. Since Amy Rowley was receiving passing grades and otherwise succeeding in school, the only question before the Court was whether the school was required to give Amy sufficient assistance to allow her to receive the same educational benefit as her non-disabled peers. The *Rowley* Court did not have occasion to consider the question of what level of educational benefit the school district would have been required to provide Amy Rowley had she not been progressing successfully through school in a regular education classroom.

The Court in *Rowley* rejected the idea that self-sufficiency was the substantive standard that Congress imposed on the states, "[b]ecause many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal." *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. 3034. The Court recognized, however, that a key concern of and primary justification for the IDEA's predecessor was the desire to foster self-sufficiency in handicapped children. The Court quotes, for example, the following Senate Report excerpt:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain

> burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S.Rep. No. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433 (quoted in *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. 3034). The Court also quotes one of the principal Senate sponsors of the legislation stating, "Providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. 3034 (quoting 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams)).[16]

The current version of the IDEA provides further support for such sentiments. Congress explicitly found that shortcomings of the previous act, the Education for all Handicapped Children Act of 1975, included low expectations for disabled children and "an insufficient focus on applying

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[16] Similar ideas were expressed in *Polk:*

> The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens. . . .
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> . . . . [T]he emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom—enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society.

Polk, 853 F.2d at 181-82.

replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. § 1400(a)(4). Congress has declared that the school personnel who work with disabled children should receive high quality professional development in order to provide such personnel with the skills necessary to "ensure that [all disabled children] have the skills and knowledge necessary to enable them . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible." 20 U.S.C. § 1400(a)(5)(E). Indeed, one of the stated purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living*." 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.[17] Indeed, states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress. In evaluating whether an educational benefit is meaningful, logic dictates that the benefit "must be gauged in relation to a child's potential." *Polk*, 853 F.2d at 185. Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children.

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[17] The implication from these manifestations of congressional intent might be that, where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required.

The obvious objection to the meaningful benefit standard is the expense involved. As the Supreme Court has noted, however, "There is no doubt that Congress imposed a significant financial burden on States and school districts that participate in the IDEA." *Florence County Sch. Dist. Four v. Carter ex rel. Carter,* 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (rejecting argument that excessive cost of reimbursement could excuse school district from reimbursing parents in accord with IDEA's mandate). School districts are permitted to consider cost in devising an appropriate educational program. *E.g., Clevenger v. Oak Ridge Sch. Bd.,* 744 F.2d 514, 516-17 (6th Cir.1984). A case such as Zachary Deal's, however, is precisely the sort of situation where judicial intervention is necessary to fulfill congressional intent and serve the public interest. Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole.

It has often been said that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Rowley,* 458 U.S. at 207-08, 102 S.Ct. 3034 (stating that courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy). "[F]ederal courts are generalists with no expertise in the educational needs of handicapped children, and will benefit from the factfinding of a state agency with expertise in the field." *Renner,* 185 F.3d at 641 (quoting *Smith,* 879 F.2d at 1343); *see Metro. Bd. of Pub. Educ., Metro. Gov't v. Guest ex rel. Guest,* 193 F.3d 457, 462 (6th Cir.1999) (noting that federal courts "are given the benefit of expert factfinding by a state agency devoted to this very purpose") (quoting *Crocker v. Tenn. Secondary Sch. Athletic Ass'n,* 873 F.2d 933, 935 (6th Cir.1989)). What seems to have been overlooked by the district court in this case is that the ALJ is a representative of the state presumed to have both the educa-

tional expertise and the ability to resolve questions of educational methodology that the federal courts do not have. While the district court always is required to give due deference to administrative findings in an IDEA case, even greater weight is due to an ALJ's determinations on matters for which educational expertise is relevant. *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir.2003). The district court here does not appear to have accorded due deference to the ALJ's findings, especially in areas touching upon the ALJ's presumed educational expertise.

The Court is cognizant, however, that the ALJ did not have the benefit of the additional evidence provided to the district court at trial. On remand, the district court must carefully consider all of the evidence in this case, giving due deference to the ALJ's findings, in determining whether a substantive IDEA violation occurred under the meaningful benefit standard. In conducting this inquiry, the court should "carefully consider[ ] the student's individual abilities." *Ridgewood*, 172 F.3d at 248. The district court's decision regarding substantive violations is REVERSED, and this case is REMANDED to allow the court to determine whether the School System provided Zachary with a meaningful educational benefit.

4. Reimbursement

The ALJ awarded the Deals reimbursement for their home-based ABA program and for "related services," such as physical, speech, and occupational therapy. The ALJ found that the 1999-2000 IEP did not offer an education in the least restrictive environment, and that the parents' placement at the Primrose School did. He refused, however, to award the Deals reimbursement for that placement because they failed to give the School System the statutorily required notice. The district court reversed the ALJ's decision insofar as it required the School System to reimburse the Deals for any of the costs incurred by them in providing any educational

services to Zachary. It affirmed the ALJ's decision to the extent that the decision denied reimbursement for other costs.[18]

Once an IDEA violation is found, the court is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Parents are entitled to retroactive reimbursement if the school district failed to provide the student with a FAPE and if the private placement chosen by the parents was reasonably calculated to enable the child to receive educational benefits. *Florence County,* 510 U.S. at 11-16, 114 S.Ct. 361; *Knable ex rel. Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 763 (6th Cir.2001). "'[E]quitable considerations are relevant in fashioning relief,' and the court enjoys 'broad discretion' in so doing." *Florence County,* 510 U.S. at 16, 114 S.Ct. 361 (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.,* 471 U.S. 359, 374, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)); *see Knable,* 238 F.3d at 771 ("[I]t is the district court's role in the first instance to weigh the equities in this case to determine the appropriate level of reimbursement to be awarded.").

Here, the Deals are entitled to reimbursement. The School System deprived Zachary of a FAPE by predetermining his placement and by failing to ensure the attendance of regular education teachers at certain IEP meetings. Furthermore, the district court has the opportunity, on remand, to find an additional, substantive, IDEA violation by the School System. The private educational services provided by the Deals clearly were proper under the IDEA. *See Florence County,* 510 U.S. at 11-16; *Knable,* 238 F.3d at 770-71. The district

[18] Plaintiffs-Appellants do not seek relief from this Court on the basis of the district court's denial of related services reimbursement, so the Court need not reach that issue. The Court also need not analyze the LRE issue since, even if the Court were to find that the 1999-2000 IEP violated the LRE requirement, there would be no basis upon which to reverse the ALJ's determination regarding the statutory notice.

court's task on remand thus is to determine the level of reimbursement that is "appropriate" in light of the IDEA's purpose. *Burlington,* 471 U.S. at 369, 105 S.Ct. 1996; *see Florence County,* 510 U.S. at 16, 114 S.Ct. 361 (stating that the district court "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"). For the reasons previously stated, the district court's reimbursement decision is REVERSED, and the case is REMANDED for the court to weigh the equities and determine the appropriate level of reimbursement.

D. Award of Costs

The district court ordered that the School System "shall recover of the plaintiffs its costs of action." Plaintiffs-Appellants argue that this imposition of costs is "wholly erroneous and 'chilling.'" Because, pursuant to this Court's instant rulings, Plaintiffs-Appellants are the prevailing parties, the district court's order on costs is MOOT, and the Court need not further consider the issue.

IV. CONCLUSION

For the foregoing reasons, the Court AFFIRMS the district court's decisions on the additional evidence and judicial notice issues. The Court REVERSES the district court's determinations regarding procedural and substantive violations of the IDEA, as well as reimbursement relating to those violations. Because Plaintiffs-Appellants are now the prevailing parties, the issue of costs is MOOT. This case is REMANDED for further proceedings in accordance with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. TENNESSEE
Southern Division

No. 1:01-CV-295

MAUREEN DEAL and PHILLIP DEAL, on behalf of ZACHARY DEAL, an infant child with a disability,
Plaintiffs,

v.

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Defendant.

March 4, 2003.

MEMORANDUM OPINION

EDGAR, *Chief Judge.*

Plaintiffs Maureen and Phillip Deal are the parents of Zachary Deal ("Zachary"), a child diagnosed with autism spectrum disorder.[1] Zachary and his parents reside in Hamilton County, Tennessee, and Zachary attended public school in the Hamilton County school system. Maureen and Phillip Deal (the "Deals") bring this action on behalf of Zachary under the Individuals With Disabilities Act ("IDEA"), 20 U.S.C. §§ 1400-1420. The case comes before this Court on appeal from a decision by an Administrative Law Judge ("ALJ") pursuant to 20 U.S.C. § 1415 § (i)(2) [sic]. The ALJ

[1] Throughout this memorandum opinion this condition will be referred to as autism. The manifestations of autism vary with different children. Common behaviors are deficits in communication and social interaction. Zachary suffers from these deficits.

ordered defendant Hamilton County Department of Eduction ("HCDE") to reimburse the Deals for expenses they incurred after May 11, 1998, in private treatment for Zachary outside of the public school system. The ALJ declined to order the HCDE to reimburse the Deals for certain other expenses. Plaintiffs and HCDE seek judicial review of the decision rendered by the ALJ on August 20, 2001.

I.

Statutory Framework

The purpose of the IDEA is to guarantee children with disabilities access to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1); *See N.L. ex rel. Mrs. C. v. Knox County Schools*, 315 F.3d 688, 689 (6th Cir.2003); *Burilovich v. Board of Educ. of Lincoln*, 208 F.3d 560, 565 (6th Cir.2000). FAPE is defined in 20 U.S.C. § 1401(8) as meaning special education and related services that (a) are provided at public expense, under public supervision and direction, without charge; (b) meet the standards of the State educational agency; (c) include an "appropriate" preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individual education program required under 20 U .S.C. § 1414(d).

The statutory framework of the IDEA is summarized in *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 762-63 (6th Cir.), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2593, 150 L.Ed.2d 752 (2001). In exchange for federal funding, the IDEA requires the State of Tennessee and HCDE to identify, locate, and evaluate all children residing in Hamilton County who are disabled and in need of special education and related services. HCDE must develop a curriculum specially tailored to the unique needs of each disabled child by means of an individualized education plan ("IEP"). *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 73

L.Ed.2d 690 (1982) *Knable*, 238 F.3d at 762-63; 20 U.S.C. §§ 1401(a)(2) and 1414(a)(5). The development and implementation of the IEP are the "cornerstones" of the IDEA. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *Tennessee Dept. of Mental Health v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir.1996).

The Deals object to the IEPs that HCDE devised for Zachary. The IDEA provides a review process through which parents who disagree with the appropriateness of an IEP can seek relief. The review process begins with a complaint by the parents to HCDE, followed by an impartial due process hearing before an ALJ from the Tennessee Department of Education. 20 U.S.C. § 1415(f). Any party aggrieved by the result of the administrative hearing and the ALJ's decision may bring a civil action in federal district court to obtain judicial review pursuant to 20 U.S.C. § 1415(i)(2). *Knable*, 238 F.3d at 763.

During the course of the IDEA review process, the parents and the school district are required to continue the then-current educational placement of the child as set forth in the current IEP. 20 U.S.C. § 1415(j). If the parents opt not to comply with the "stay-put" provision, they are not necessarily barred from recovering the costs of private educational placement for the disabled child. Parents, such as the Deals, who elect to remove their child from the current educational placement provided in the IEP prior to completion of the IDEA review process, and who pay for appropriate specialized education, may seek retroactive reimbursement from the public school district. *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Knable*, 238 F.3d at 763, 770-71.

However, the Deals are entitled to such retroactive reimbursement only if a federal court determines both (1) that the disabled child's placement by the school district violated the

IDEA (*i.e.*, that the child was deprived of FAPE), and (2) that the private placement selected by the parents was appropriate. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *Knable*, 238 F.3d at 763, 770; *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 184 (6th Cir.(1996) [sic]. Parents who unilaterally remove their child from public school contrary to the then-current IEP, and prior to completion of the IDEA review process, do so at their own financial risk. *Florence County*, 510 U.S. at 15, 114 S.Ct. 361; *Burlington*, 471 U.S. at 373-74, 105 S.Ct. 1996; *Knable*, 238 F.3d at 763; *Wise*, 80 F.3d at 184; *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 460-61 (6th Cir. 1993). The Deals bear the burden of proof by a preponderance of the evidence that the IEPS developed for Zachary failed to provide him with a FAPE. *Knable*, 238 F.3d at 768; *Tullahoma City Schools*, 9 F.3d at 458. If they do not meet this burden, the Deals are not entitled to reimbursement for the costs incurred by their educating Zachary privately. *Burilovich*, 208 F.3d at 572.

II.

Standard of Review

20 U.S.C. § 1415(i)(1)(2)(B) provides that the Court shall receive the records of the administrative proceeding and shall hear additional evidence at the request of a party. *See Knable*, 238 F.3d at 763-64. On January 23-24, 2003, the Court held a hearing and received additional evidence at the request of HCDE. In accordance with § 1415 § (i)(1)(2)(B) [sic], this Court has reviewed the complete record consisting of the administrative record and the additional evidence presented at the hearing on January 23-24, 2003.

20 U.S.C. § 1415(i)(2)(B)(iii) provides that the Court, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Plaintiffs bear the burden of proving by a preponderance of

the evidence that the IEP devised by HCDE for Zachary was inappropriate and failed to provide Zachary with FAPE. *Knable*, 238 F.3d at 768; *Dong v. Board of Educ. of Rochester Community Schools*, 197 F.3d 793, 799-800 (6th Cir.1999); *Renner v. Board of Educ. of Pub. Schools of City of Ann Arbor*, 185 F.3d 635, 642 (6th Cir.1999); *Tullahoma City Schools*, 9 F.3d at 458; *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir.1990).

The Court reviews both the procedural and substantive matters under a modified *de novo* standard of review. In reviewing the ALJ's decision under 20 U.S.C. § 1415(i)(2), the Court makes an independent decision based on the preponderance of the evidence contained in the complete record, while giving due weight to the ALJ's findings of fact. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034; *Knox County Schools*, 315 F.3d at 692; *Knable*, 238 at 764; *Burilovich*, 208 F.3d at 565; *Renner*, 185 F.3d at 641; *Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 501-03 (6th Cir.1998); *Tullahoma City Schools*, 9 F.3d at 458. In explaining the concept of "due weight" under the IDEA, the Sixth Circuit has said that courts cannot simply adopt the ALJ's findings of fact without an independent examination of the evidence. *Knable*, 238 F.3d at 764; *Burilovich*, 208 F.3d at 565-66; *Dong*, 197 F.3d at 799; *Metropolitan Bd. of Public Educ. v. Guest*, 193 F.3d 457, 464 (6th Cir.1999); *Peck By Peck v. Lansing School Dist.*, 148 F.3d 619, 625 (6th Cir.1998); *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir.1998).

In *Burilovich*, 208 F.3d at 566, the Sixth Circuit explains that the weight due varies depending on whether the Court is reviewing procedural or substantive matters and whether educational expertise is essential to the administrative findings. This Court reviews an IEP for procedural compliance but harmless technical deviations from the IDEA procedural safeguards do not render an IEP invalid and do not constitute

a denial of FAPE. *Knable*, 238 F.3d at 764-65; *Burilovich*, 208 F.3d at 566; *Dong*, 197 F.3d at 800. Furthermore, if the Court finds that the State of Tennessee and HCDE have met the procedural requirements of the IDEA, then greater deference is afforded to their educational decisions. *Burilovich*, 208 F.3d at 566; *Dong*, 197 F.3d at 800; *Tucker*, 136 F.3d at 502; *Roncker On Behalf of Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.1983).

With regard to substantive issues, the "preponderance of the evidence" language in 20 U.S.C. § 1415(i)(2)(B)(iii) is not an invitation to the courts to substitute their own notion of sound educational policy for those of the public school authorities. *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034; *Knable*, 238 F.3d at 764; *Burilovich*, 208 F.3d at 566; *Renner*, 185 F.3d at 641; *Tucker*, 136 F.3d at 505; *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir.1990). In assuring that the requirements of the IDEA have been met, this Court must be careful to avoid imposing its view of preferable educational methods upon HCDE and the State of Tennessee. "The primary responsibility for formulating the education to be accorded to a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034; *see also Burilovich*, 208 F.3d at 566.

Congress did not intend for the federal courts to overturn a school district's choice of appropriate educational methods for a disabled child in a 20 U.S.C. § 1415(i)(2) proceeding. Once a court determines that the procedural requirements of IDEA have been met and that the IEP developed by the school district is appropriate to provide the disabled child with FAPE, other disputes or debates over preferences in appropriate educational methodologies are to be resolved by the State and local education authorities without interference

by the courts. *Rowley*, 458 U.S. at 207-08, 102 S.Ct. 3034; *Tucker*, 136 F.3d at 505; *Tullahoma City Schools*, 9 F.3d at 458; *Roncker*, 700 F.2d at 1062.

Because federal courts are "generalists with no expertise in the educational needs of handicapped children," they benefit from the factfinding of state agencies which are presumed to have expertise in the field. *Burilovich*, 208 F.3d at 566; *Renner*, 185 F.3d at 641; *Doe By and Through Doe v. Smith*, 879 F.2d 1340, 1343 (6th Cir.1989). The "due weight" standard militates against second guessing the educational expertise of administrative officials and the findings predicated upon their expertise. *Cleveland Heights-University Heights City School Dist. v. Boss*, 144 F.3d 391, 398-99 (6th Cir. 1998). Accordingly, when reviewing an IEP, the Court keeps in mind that state and local administrative agencies are deemed to have expertise in education policy and practice.

The amount of weight due an administrative decision depends upon whether such expertise is relevant to the decision-making process. "[L]ess weight is due to an administrative agency's determination on matters for which educational expertise is not relevant, so that a federal court would be just as well suited to evaluate the situation. More weight is due an agency's determinations on matters for which educational expertise is relevant." *Burilovich*, 208 F.3d at 567.

Administrative findings in IDEA cases are afforded less deference than that given to agency decisions under the substantial evidence test. *Id.* In view of the preponderance of the evidence standard applicable to IDEA, the Sixth Circuit holds that "administrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of the worth of the testimony, or both." *Id.; see also Knox County Schools*, 315 F.3d at 692. In sum, this Court should defer to the ALJ's findings of fact below

only when educational expertise is relevant to those findings and the ALJ's decision is reasonable based on the complete record. *See Burilovich*, 208 F.3d at 567.

III.

Factual History

In 1997 when Zachary was three years old, HCDE held an Individualized Education Plan ("IEP") meeting and, together with the Deals, prepared an IEP for Zachary. There is no contention that the procedure followed by HCDE in formulating this particular IEP was in any way faulty. Pursuant to this IEP, Zachary attended a comprehensive development class ("CDC") at Ooltewah Elementary School, an HCDE public school. Because Zachary was only of pre-school age, this class did not include normal children, who must wait until they are older to attend kindergarten. The class consisted only of pre-school children such as Zachary, all of whom had special needs, but all of whom had better communication and social skills than Zachary.

The IEP team convened additional meetings in October 1997 to revise Zachary's IEP. The CDC class was comprised of ten students, who had two team teachers, Lisa Steele and Ann Kennedy, both of whom were qualified to teach children with autism. In addition, speech therapy was provided by Paula Wiesen, a certified speech language pathologist. During this period, Zachary did receive individual attention, which included applied behavior analysis ("ABA") techniques. Until Christmas 1997 Zachary attended this class and made some progress. However, during the latter half of the 1997-98 school year, Zachary only attended the CDC class thirty-five percent of the time provided in the IEP, this despite the Deals having approved of the 1997-98 IEP. Zachary's absence effectively prevented the HCDE from implementing the IEP.

In the meantime the Deals began teaching Zachary outside of school using a program developed by the Center for Autism and Related Disorders ("CARD"). This program, according to the ALJ, is patterned after a methodology for treating autistic children developed by Dr. Ivar Lovaas at the University of California at Los Angeles. This methodology, as well as many other methodologies for treating autism utilizes ABA, which is a psychological approach based on behaviorism, and operates on the premise that people learn from their environment. The ALJ characterized this as "Lovaas-style ABA." By way of additional evidence, not available to the ALJ, this Court has heard expert testimony from Doctors Burton Leaf and Betty Jo Freeman. Dr. Leaf worked with Dr. Lovaas when the methodology was being developed in the 1970s. Dr. Freeman is currently a Professor at UCLA Medical School in the Department of Medical Psychology. According to both of these highly qualified experts, the methods for treating autism are continually changing, and that while the CARD program does take a behavioral approach, neither it, nor any other program, can accurately be described as "Lovaas-style ABA." There were several meetings of the Deals and school personnel during the 1997-98 school year. In May 1998, an IEP team met wherein the Deals requested extended year services ("ESY") for the summer in the form of a 40-hour per week one-on-one home-based "Lovaas-style ABA" program. The outcome, however, was that HCDE would provide Zachary the services of Anna Davenport, Zachary's private speech therapist, for three 45-minute therapy sessions per week. The Deals agreed to this.

With the agreement of all parties, the next IEP meeting was held on October 15, 1998. Zachary was then four years old. At this time, a 95-page IEP was prepared. This plan provided, among other things, for 35 hours per week special education instruction, with many explicit goals. Zachary also would have related services including physical therapy and speech therapy. The Deals thereafter filed a "minority report"

wherein they expressed the view that HCDE should provide them with their CARD program. The Deals sent Zachary to public school only sixteen percent of the time during the 1998-99 school year. There were several IEP meetings throughout this school year at which the Deals' concerns were discussed. In fact, over the two-year period from 1997 into 1999, there were approximately a dozen meetings between the Deals and HCDE teachers and administrators. These meetings consumed approximately 500 staff hours of HCDE employees.

At a May 1999 IEP meeting the Deals again requested a summer ESY program of 43 hours per week of one-on-one ABA therapy, and five hours per week of speech therapy. Since Zachary had not been attending school in accordance with the previous IEP, the HCDE was not able to evaluate his need for those services, and declined to offer them.

In August 1999 there were two IEP team meetings to develop a plan for the 1999-2000 school year. At this time Zachary was five years old. The 1999-2000 IEP was again very extensive. HCDE proposed that Zachary would, in addition to his CDC classes, attend a regular kindergarten classroom in duration, three times per week for 15 minutes each, as well as lunch with a regular kindergarten classroom. This time was to be increased as Zachary was able to tolerate it. He would have with him a classroom assistant familiar with and trained to meet Zachary's needs. The IEP provided for one-on-one discreet trial teaching ("DTT"). The IEP called for the use of picture cues; incidental teaching to provide opportunity for carryover and application of learned skills; continual use of functional communication techniques with hand-over-hand physical prompts; as well as picture and visual prompts as necessary; activity-based instruction focusing on Zachary's interests; picture exchange communication ("PEC") system; use of storytelling, music, reading for listening, questioning, answering, behavior and following

directions; and other teaching methods. The IEP also provided speech and language therapy for 30 minutes five times per week; occupational therapy two times per month, and physical therapy once per week for 30 minutes.

The Deals were not pleased with this. It was their opinion that Zachary must receive, at HCDE expense, their CARD program. On September 16, 1999, the Deals, in a long letter from their lawyer, first requested a due process hearing under the provisions of IDEA. This hearing effectively triggered this litigation. The Deals had already, without notifying the HCDE, enrolled Zachary in a private school, The Primrose School. Zachary did not attend public school during the 1999-2000 school year. Obviously for that reason, HCDE was unable to implement the 1999-2000 IEP.

In August 2000, there was another IEP meeting, at which an IEP plan was prepared for the ensuing year. This plan called for Zachary to be placed in a regular kindergarten class with specified objectives, and with many special considerations to deal with Zachary's special needs. He would also receive one-on-one speech therapy five times per week, as well as occupational therapy. The Deals again took the position that Zachary must be provided their one-on-one ABA program. He did attend Westview Elementary (HCDE) that year, but only part time.

IV.

Analysis

The determination of whether HCDE complied with IDEA is distilled into answering two questions:

> (1) Has HCDE complied with the procedures set forth in the statute?; and
>
> (2) Is the challenged IEP "reasonably calculated to enable the child to receive educational benefits"?

Rowley, 458 U.S. at 206-07, 102 S.Ct. 3034; *Knox County Schools*, 315 F.3d at 693; *Knable*, 238 F.3d at 763; *Buri-*

lovich, 208 F.3d at 565; *Tucker*, 136 F.3d at 501-02. This, as set forth above, is the *Rowley* test.

A. *Procedure*

As the Supreme Court first recognized in *Rowley*, the procedural safeguards in IDEA are important because they provide all parties, particularly the parents, with participation in the development of the IEP. 458 U.S. at 205-06, 102 S.Ct. 3034. The ALJ found "significant procedural violations of the IEP process" in this case. The ALJ erred. The ALJ seems to have concluded that HCDE failed to follow statutory procedures by making a pre-determination about what Zachary's IEP should be. However, contrary to the ALJ's determination, there was no such procedural violation in this case. One thing that stands out about all the many IEP meetings in this case is that the Deals were present at every one of them; and that at every one of those meetings the Deals took the opportunity to forcefully advocate their position. While HCDE did not agree with the Deals, and while they may have even come to IEP meetings with a definite point of view, this does not amount to a procedural violation.

The United States Court of Appeals for the Sixth Circuit has recently held that "when a parent fully participates in the IEP meeting and is an active participant in the final determination of the child's eligibility, there is no substantive harm caused where school appointed experts and school officials confer *ex parte* so as to coordinate the drafting of an assessment report." *Knox County Schools*, 315 F.3d at 694. As the Sixth Circuit has observed, prudence requires that school districts do some preplanning. *Id.* at 693-94 n. 3. HCDE could come to IEP meetings with pre-formed opinions regarding the best course of action for Zachary so long as school officials were willing to listen to the Deals, and the Deals had the opportunity to make objections and suggestions. *Id.* at 694.

As related above, there were about a dozen of these IEP meetings with the Deals. Many of these were lengthy. HCDE devoted many staff hours to this issue in just the first two years (1997-99). A review of the IEPs reveals that HCDE went to great lengths to listen to the Deals. The Deals reported in detail Zachary's development and acquired skills. These were duly recorded in the IEPs by HCDE. Along with other IEP meeting participants, the Deals mutually arrived at a number of goals for Zachary; and while the Deals did not prevail in their quest for "Lovaas-style ABA" via the CARD program, all parties did indeed reach agreement from time to time on some things, including some classroom instruction as well as related services, including speech therapy. There is nothing in IDEA which requires school systems to accept the parents' point of view, or suffer a procedural violation of the statute. The facts of this case do not add up to predetermination on the part of HCDE.

The ALJ also determined that "the failure to have regular education teachers attend the IEP team meetings is also a troubling procedural violation." In fact, however, the ALJ's findings only catalog two IEP meetings (October 1998 and February 1999) where a regular school teacher was not present. There was no statutory requirement that a regular education teacher be present at IEP meetings prior to 1998. The Sixth Circuit has concluded that: "a procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents." *Knable*, 238 F.3d at 765; *see also Knox County Schools*, 315 F.3d at 693; *Guest*, 193 F.3d at 464-65. It is obvious in this case that the absence of a regular school teacher at these two meetings did not cause substantive harm to Zachary or his parents. In October 1998, Zachary was four years old. He would not have been attending regular school during the 1998-1999 school year because he had not reached age five.

It is difficult to see what meaningful contribution a regular school teacher could have made to this meeting. The February 1999 IEP meeting was held at a time when the IEP for the 1999-2000 school year had long been formulated, and during a time when Zachary was not even attending an HCDE school. Again, it risks stating the obvious to conclude that this had no effect on the welfare of Zachary or the Deals.

The ALJ also concluded that "a well established IEP team must have someone on it who is knowledgeable about Lovaas-style ABA and who has an open mind about whether or not to recommend ABA for autistic pre-school children." This is clearly erroneous. There is *no* requirement under IDEA that a school district "include an expert in the particular teaching method preferred by the parents . . ." *Burilovich*, 208 F.3d at 569; *Dong*, 197 F.3d at 801. In view of the discussion below regarding education methodologies, it would indeed be antithetical to IDEA to require that an IEP team contain any member that is disposed toward any particular methodology.

In sum, the ALJ erred in concluding that there were procedural violations here that denied Zachary a FAPE.

B. *Substantive*

In deciding whether the HCDE IEPs substantively provided Zachary a FAPE, considerable deference is due HCDE's educational decisions in view of this Court's conclusion that IDEA's procedural requirements have been met. *Burilovich*, 208 F.3d at 566; *Dong*, 197 F.3d at 800; *Tucker*, 136 F.3d at 502; *Roncker*, 700 F.2d at 1062.

As related above, parents of a handicapped child may receive reimbursement when they withdraw their child from public school. *Burlington*, 471 U.S. at 369, 105 S.Ct. 1996. However, they are entitled to reimbursement "only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Florence County*, 510 U.S. at 15;, 114 S.Ct. 361[;]

Knable, 238 F.3d at 763, 770. While this Court has heard considerable evidence concerning whether the educational course which the Deals chose for their son outside of public school was appropriate, this case need not be decided on the merits or demerits of that program. Instead, the Court's focus is upon whether the educational program provided by the HCDE as embodied in its IEPs for Zachary would have provided Zachary with a FAPE. Pursuant to the definitions contained in IDEA, a "'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley*, 458 U.S. at 188-189, 102 S.Ct. 3034. This Court concludes, contrary to the ALJ, that HCDE has at all times provided a FAPE to Zachary.

The ALJ concluded the only educational methodology that would provide Zachary with a FAPE is one that includes "an intensive Lovaas-style component." The ALJ's decision ignores the admonition of the Supreme Court in *Rowley* that "the courts must be careful to avoid imposing their view of preferable educational methods upon the States," 458 U.S. at 207, 102 S.Ct. 3034; and that IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authority." *Rowley*, 458 U.S. at 205, 102 S.Ct. 3034 (quoted in *Burilovich*, 208 F.3d at 566); *Renner*, 185 F.3d at 641; and *Thomas*, 918 F.2d at 624.

The ALJ is critical of the HCDE's IEPs for Zachary, contending that the IEPs provide an eclectic mix of methodologies other than "Lovaas-style ABA," using particularly a methodology named TEACCH; and the ALJ seems to be of the opinion that HCDE should be offering a program that can be described as a unified methodology such as, what the ALJ

terms, "Lovaas-style ABA."[2] However, nowhere in IDEA is there a requirement that a FAPE cannot be eclectic, or cannot employ multiple teaching approaches. The Act does not specify *any* particular methodology. Indeed, Dr. Freeman testified there is no scientific consensus that any one method of treating autism is any better than another.[3] The Act, said the Supreme Court in *Rowley,* only provides a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley,* 458 U.S. at 201, 102 S.Ct. 3034.

The ALJ is also critical of HCDE because it considered cost in arriving at the methodology embodied in its IEPs and in ruling out "Lovaas-style ABA." Again, the IDEA contains no prohibition against a school district considering cost in the formulation of an IEP so long as the IEP provides a FAPE for the handicapped child. *Clevenger v. Oak Ridge School Bd.,* 744 F.2d 514, 516-17 (6th Cir.1984); *J.P. ex. rel. Popson v. West Clark Community Schools,* 230 F.Supp.2d 910, 941 (S.D.Ind.2002); *L.B. v. Nebo School Dist.,* 214 F.Supp.2d 1172, 1188 (D.Utah 2002); *Matta v. Bd. of Educ.-Indian Hill ex. Vil. Schools,* 731 F.Supp. 253, 255 (S.D.Ohio 1990). While it is certainly recognized that it costs more to educate children with handicaps, it would not be a responsible caretaking of the public fisc for a school district to fail to take cost into consideration.

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[2] In finding the facts the ALJ made curious "credibility" findings on various witnesses. It appears that for the most part, if the witness happened to espouse views favorable to "Lovaas-style ABA" they were "credible." If they did not espouse those views, they were "not credible."

[3] This conclusion is borne out in a recent review of the literature on autism published by the National Academy of Sciences, entitled *Educating Children with Autism* (National Academy Press, 2001). This Court has been unable to locate any reference to "Lovaas-style ABA" in this 229-page book.

The ALJ made a finding that TEACCH, one of the methodologies employed by the HCDE, is currently the "most widespread methodology" used by school systems today, yet the ALJ still found that the HCDE program was not a FAPE because HCDE "failed to produce convincing evidence that their methodology for young children with autism was equal to or better than a program based primarily on ABA intervention." The ALJ thus effectively reversed the burden of proof. It is the Deals, not HCDE, who must bear the burden of proving that IEPs are inappropriate. *Tullahoma City Schools*, 9 F.3d at 458; *Knable*, 238 F.3d at 768. Moreover, it is not necessary to FAPE status that the HCDE program be equal to or better than the parents' preferred methodology. It is sufficient under IDEA for HCDE to provide a "serviceable Chevrolet" in the face of the Deals' demand for a "Cadillac." *Tullahoma City Schools*, 9 F.3d at 459-460.

The ALJ concludes that HCDE did not, in its 1999-2000 IEP, plan to educate Zachary with "typically developing peers" to the maximum extent possible. Instead, according to the ALJ, Zachary was "offered, basically a year of education in a CDC classroom where every single child was disabled." It is true that IDEA and its regulations do express a preference for educating handicapped children in the least restrictive environment to the maximum extent appropriate. *Tennessee Department of Mental Health*, 88 F.3d at 1471; 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550-556. However, given the facts of this case, it cannot be said that the HCDE failed to comply with IDEA in this regard. In fact, the IEP for 1999-2000 did provide for gradually working Zachary into a regular kindergarten class. Moreover, even in his CDC class, the other children functioned at a higher level than did Zachary; and his teacher, Lisa Steele, observed that Zachary did not model bad or inappropriate behavior of the other children in the CDC class.

Two very well qualified experts, David J. Rostetter, and Betty Jo Freeman, Ph.D., testified before this Court that they had thoroughly examined the HCDE IEPs. They both concluded independently that the IEPs did indeed provide Zachary with a FAPE. A review of recent case law also reveals that courts have consistently rejected parents' claims that some version of "Lovaas" treatment for autism is necessary to provide a FAPE. *Burilovich*, 208 F.3d 560 (Lovaas "DTT"); *Dong*, 197 F.3d 793 ("Lovaas-style DT" is an "appropriate methodology as well as TEACCH"); *Renner*, 185 F.3d 635 ("Lovaas-style DTT," finding "no consensus within the educational or medical communities on the most effective way to treat autism in pre-primary age children"); *Popson*, 230 F.Supp.2d at 910 (Lovaas "ABA/DTT" versus an "eclectic intervention" approach).

HCDE's program was appropriate for Zachary, not only because it provided an acceptable methodology, but because HCDE had qualified personnel to implement it. For example, Lisa Steele, the HCDE designated special education teacher, has a state teaching certification for special education, a masters degree, and graduate courses. She also has experience with ABA. There is considerable evidence that Zachary made acceptable progress during the short time the Deals permitted him to attend public school.

Although this Court cannot conclude that the Deals' placement of Zachary in private school, and their single minded pursuit of one-on-one "Lovaas-style ABA" was not appropriate, there is testimony from Drs. Freeman and Leaf in the record that would support such a conclusion. As Dr. Leaf testified, he is not sure what is meant by the term "Lovaas-style ABA." Dr. Leaf, who worked with Dr. Lovaas and wrote a chapter in a book produced by Lovaas, testified that, in fact, Lovaas and others used varying techniques to address autism. Each child is treated differently. Even Lovaas does not practice exclusively "Lovaas." Moreover, the data cited

by the ALJ about the success of the Lovaas methodology is suspect. That data was supposedly produced by Dr. Lovaas and his colleagues, who were working in a clinical setting. The CARD program is based on a "workshop" model which would not be expected to produce the higher results achieved in a clinic at UCLA. The IQ scores for Zachary cited by the ALJ are not particularly helpful or meaningful. In evaluating the progress of autistic children, IQ is very difficult to ascertain and not as important as what a child can or cannot do. In fact, observations by the experts of videotapes of Zachary at The Primrose School and elsewhere, along with observations of HCDE teachers, reveal that Zachary's progress is not what they would have expected from a program different from that provided to Zachary by his parents. Aside from whatever results the "Lovaas-style" methodology might achieve, there is also evidence that the TEACCH methodology utilized by HCDE also achieves results, and this methodology is not in fact out of date, the ALJ's conclusions to the contrary notwithstanding.

The truth is, there are a number of effective ways to deal with autism. Methodologies are continually changing with the acquisition of more scientific knowledge. As the Supreme Court recognized in *Rowley*, courts must be mindful that they lack the "'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" 458 U.S. at 208, 102 S.Ct. 3034 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 42, 93 S.Ct. 1278). Congress did not intend in the IDEA, to tie the hands of educators to any particular way of dealing with autism, or any other handicap.

V.

Conclusion

The ALJ concluded that HCDE denied Zachary a FAPE because it did not provide him "intensive Lovaas-style ABA."

The ALJ therefore ordered HCDE to reimburse the Deals for the home-based ABA program received by Zachary after May 11, 1998. This was error. This Court, as related above, is required to give due weight to the ALJ's finding of fact. However, deference is not due here where the state and local educational expertise is possessed not by the ALJ, but by HCDE, and where an independent examination of the record reveals factual, as well as legal errors. For these reasons, a judgment will enter REVERSING the ALJ's decision insofar as it required HCDE to reimburse the Deals for any of the costs incurred by them in providing education for their son, Zachary. The ALJ denied the Deals reimbursement for certain other costs, *i.e.*, expense of Zachary's attendance at Primrose School and the costs of certain evaluations. To this extent, the decision of the ALJ is AFFIRMED, there being no error in those particular conclusions.

A judgment will enter.

JUDGMENT

This case came before the Court for a hearing on January 23 and 24, 2003. For the reasons expressed in the memorandum opinion filed herewith, the decision of the Administrative Law Judge ("ALJ") is REVERSED IN PART AND AFFIRMED IN PART. The Hamilton County Department of Education is not required to reimburse Maureen and Phillip Deal for any of the costs incurred by them in providing education to their son, Zachary, outside the classes and training provided by the Hamilton County, Tennessee Department of Education. The Hamilton County Department of Education shall recover of the plaintiffs its costs of action.

SO ORDERED.

APPENDIX C

BEFORE THE TENNESSEE STATE
DEPARTMENT OF EDUCATION

No. 99-59
A. JAMES ANDREWS
Administrative Law Judge

ZACHARY DEAL,
Petitioner,

vs.

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Respondent.

MEMORANDUM OPINION AND FINAL ORDER

INTRODUCTION

Zachary Deal is a seven-year-old boy with highly motivated college educated parents. Zachary's parents became concerned when he appeared slow in developing speech at eighteen months of age. At his two-year checkup, Zachary's pediatrician reassured his parents and suggested they revisit the issue if had [sic] not begun speaking within the next six months. Around this time, a relative suggested the possibility that Zachary might be autistic and Mr. and Ms. Deal began to research the subject of autism on their own.

A colleague of Mr. Deal's referred them to both a Chattanooga child psychologist, Dr. Susan Speraw, and to the Chattanooga Speech and Hearing Center. Zachary was tested and found to be significantly delayed in speech and language development. Because Zachary had not yet reached his third birthday, the Deals were referred to the Tennessee Early Intervention System ("TEIS") for early childhood services.

Under a TEIS developed plan, Zachary received speech and language therapy as well as some in-home services.

Ms. Deal agreed to a referral to the Hamilton County Department of Education ("HCDE") in February, 1997, and first met with a HCDE representative in May of 1997. The HCDE and the parents developed the first Individualized Educational Plan (IEP) for Zachary right after his third birthday. Under the terms of Zachary's initial IEP, and a second one prepared in October, 1997, Zachary attended the Ooltewah Elementary School (OES) where he was assigned to a class with other developmentally delayed children.

It was during this initial assignment to OES that the Deals learned about the Lovaas style applied behavioral analysis ("ABA") intervention and its purported extraordinary results for young children afflicted with autism. On their own, they began implementing a Lovaas style program to teach Zachary at home. They selected a program developed by the Center for Autistism and Related Disorders ("CARD"). The CARD program is patterned after a methodology developed and tested with autistic children by Dr. Ivar Lovaas at the University of California at Los Angeles. The methodology employs intensive one-on-one instruction in a format known as mass discreet trials ABA. It relies heavily on extremely structured teaching and comprehensive data collection and analysis.

Dr. Lovaas tested this approach to teaching autistic children in the 1980's and evaluated the results by comparing the gains in IQ and performance of the children who received this intensive one-on-one ABA instruction with a control group of children who received the normal interventions offered by their local school systems. Dr. Lovaas published the results of his experiment in 1987 and, for the best outcome students, he reported dramatic gains in IQ and in their ability to function within the regular education setting.

Virtually all students in the Lovaas study group showed significant improvement in their disabling condition. A follow up study published by another researcher in 1993 found that 47% of the students who had received the ABA intervention went on to become "indistinguishable" in their regular education classrooms.[1]

The Deals and Dr. Speraw were convinced that Zachary was making exceptional progress because of the ABA program they were funding in their home. In a May, 1998 IEP meeting, the Deals asked that the Lovaas style ABA be included in Zachary's summer services program and that HCDE pay for those services. This request for payment came after Mr. and Mrs. Deal had observed Zachary's progress in the system they were funding and providing in their home. When HCDE refused the request for Lovaas style ABA for Zachary, the Deals asked for data supporting the efficacy of the HCDE approach to teaching autistic children. These types of data were never provided to the Deals.

The HCDE has never funded an intensive Lovaas style ABA program and the HCDE had no evaluation data, self-generated or otherwise, on the effectiveness of its preferred approach for teaching autistic children. Notwithstanding the fact that it had virtually no scientific data to support the services it offered the Deals for Zachary, HCDE, rejected the Lovaas based method-

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[1] In the intervening years, the educational community has engaged in an ongoing battle over the efficacy of the Lovaas style intervention. Criticism has come from virtually every direction, yet, it remains the most comprehensive scientific analysis of a methodology for teaching autistic children to date.

Contemporaneously with this hearing, the educators conducting the research at the federally funded replication sites for the Lovaas ABA methodology began to publish preliminary results. Some of these preliminary data were introduced as exhibits to this hearing. The preliminary evidence presented at the hearing indicated that the later tests of the Lovaas methodology were achieving similar results.

ology in large part because HCDE believed there was insufficient scientific proof for that particular methodology.

The Lovaas style ABA also contradicts, at least in its initial application, twenty five years of special education philosophy and experience by eschewing the mainstream/inclusion goal for the young autistic child in favor of intensive one-on-one learning in a non-distracting environment. It is also more expensive than traditional and more widely used approaches for teaching autistic children.

The Deals rejected the IEP for 1999-2000 because it did not offer Lovaas style ABA services and because they felt it did not provide sufficient opportunity for Zachary to be educated with typically developing peers. After rejecting the 1999-2000 IEP, the Deals enrolled Zachary in a private preschool, the Primrose School, and on September 16, 1999 requested this due process hearing.

Zachary performed well at the Primrose School and continued to make significant progress in his ABA sessions. During the course of this hearing, the Deals amended their original request and added complaints alleging the HCDE violated the IDEA by denying Zachary related services and his ABA program over the course of the summer.

The due process hearing in this matter was initiated by an eighteen page request following, among other things, the HCDE's refusal to include intensive Lovaas style ABA program in Zacahry's IEP for the 1999-2000 school year. After extensive pretrial discovery, litigation, and procedural wrangling, the hearing began on March 15, 2000. Zachary's attorneys presented a comprehensive and detailed argument for the Lovaas style ABA methodology and its positive impact on Zachary Deal. The HCDE presented an equally thorough case in defense of the interventions it offered for Zachary. Neither side left a stone unturned or un-thrown in attacking the efficacy of the educational approach advocated by the other side.

The hearing began on March 15, 2000 and concluded on February 13, 2001. Because of the voluminous record, the court allowed counsel ample time to prepare their lengthy post-trial briefs and reply briefs. During the twenty seven full days of testimony, the court heard twenty different fact and expert witnesses testify on virtually all aspects of Zachary Deal's disability, his various educational placements, the progress he has or has not made, and the efficacy of the educational methodologies and related services he has and has not received or accessed.[2]

In addition to observing witnesses and listening to testimony, the court has reviewed tens of thousands of pages of exhibits and several video tapes. Finally, the court, at the insistence of the HCDE and after the testimony was concluded, personally observed Zachary (1) in his regular education class, (2) at a "pull out" speech therapy session at his school, (3) at a recess session playing with his classmates, (4) at a second speech therapy session with his private speech therapist, and (5) participating in a Lovaas style ABA therapy session in his home.

The court cannot imagine a more complete record upon which to base its findings.

I. WITNESS CREDIBILITY

Often the finder of fact, be it a jury or an administrative law judge, has to form opinions as to credibility on precious little information. Because of the detailed examinations and cross examinations by opposing counsel, however, the court

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[2] The parents continued to provide Zachary with the home based Lovaas style ABA program they said they would provide for him regardless of the outcome of the due process hearing. Both parties waived the 45 day requirement for a due process decision and both parties agreed that the issues deserved a full and fair hearing and a complete record upon which to base a decision. Thus the lengthy hearing had little or no practical effect on Zachary's education.

had an opportunity to observe the important witnesses at great length and is quite confident in assigning weight to their testimony.

After viewing their demeanor, responsiveness, and whether or not witnesses were forthright in their answers as opposed to evasive or combative, the court makes the following findings as to witness credibility and the weight to be given to particular testimony:

1. The court finds Dr. Susan Speraw credible.

2. The court finds Dr. James A. Mulick credible and well versed by virtue of both education and experience in the various methodologies available to address the needs of autistic children.

3. The court finds Irise Chapman, the Director of Exceptional Education for the HCDE, credible.

4. The court finds Dr. Ilene Schwartz, an expert on autism and methodologies applicable to the treatment of autism, to be credible and gives great weight to her testimony. Although Dr. Schwartz was produced as an expert on behalf of the HCDE, her testimony was balanced and well supported by her education and experience and rang true in all respects. Dr. Schwartz testified knowingly about the history, theory, and current practice in Lovaas style ABA. Tr. 6650-53. Her open mind and obvious commitment to furthering the knowledge base for educating autistic children made her a compelling witness.

5. The court finds Mr. Keith Amerson, an employee of and advocate for the Center for Autism and Related Disorders, credible.

6. The court finds Ms. Julie Reyes, a pre-school teacher in the private Primrose School credible.

7. The court gave reduced weight to Ms. Jane Dixon's testimony. In part, this is because Ms. Dixon steadfastly maintained she had an open mind when it came to considering which methodology would be appropriate for Zachary when the record clearly demonstrated she had a preconceived and unwavering position as someone opposed to Lovaas style ABA in any form. *See, e.g.*, Davenport at Tr. 1008-12. Ms. Dixon also maintained that she had never told the Deals that cost was a factor involved in HCDE's decision to deny Lovaas style ABA to Zachary even though the Deals produced a tape recording of a meeting they had with Ms. Dixon in which Ms. Dixon clearly announces that cost is a factor. Tr. 2436-37.

8. The court finds Lisa Steele, an experienced special education teacher with HCDE, a credible witness.

9. The court does not credit the testimony of Paula Wiessen, an experienced speech and language pathologist and preschool CDC teacher with HCDE. *See e.g.*, Tr. 1557, wherein Ms. Wiessen equates sitting in the vicinity of typically developing children with interaction and Tr. 1558, 1787, 1791 wherein she evades straightforward questions. In particular, the court finds that when she stated that she could not possibly have said whether or not Zachary needed summer services it was an untruthful answer. Tr. 1569-70. The record demonstrates clearly that she had sufficient training, education, and first hand experience with Zachary to have made a recommendation one way or the other.

10. The court gives little weight to the testimony of Ann Kennedy, a specialist in special education with HCDE who became an educational diagnostician and consultant for autism for the HCDE during the course

of the hearing. In part, this is because Ms. Kennedy demonstrated a closed mind and steadfast adherence to preconceived notions. *See, e.g.*, Tr. 1811, wherein she testifies that she believes intense instruction is itself aversive for autistic children and Tr. 1821-25 and Tr. 1884-1889, wherein she constructed her own "experiment" to evaluate Lovaas style ABA. The experiment consisted of two hours per week of what she *believed* ABA therapy would look like despite the fact that the Lovaas report found anything less that ten hours per week showed no effects whatsoever. Also, during her testimony in November of 2000, Ms. Kennedy, testifying as a HCDE autism expert, showed an appalling lack of knowledge or interest in the results of the Lovaas replication studies. Tr. 5492.

11. The court finds Sandra Jerardi, a lead teacher for HCDE, to have been both evasive and confrontational in her answers. *See, e.g.* Tr. 2249, 2165, 2349, 2350, 2574. In addition, many of her answers lacked credibility. *See, e.g.*, Tr. 2352, 2611, and 2168, wherein her answer as to why she referred to this matter as a sensitive case lacked credibility and Tr. 2176-81, wherein she excuses obvious flaws in a study which purports to validate methods of which she approves. Additionally, Ms. Jerardi testified that Zachary did not need a twelve month IEP because he was making such good progress (Tr. 2917) and then contradicted herself a few moments later when she testified that she had not seen any results that would cause her to seriously consider Lovaas style ABA services for Zachary (Tr. 2943). She also testified that once a methodology is working for a child it would be inappropriate to change methodologies, yet,

she continues to refuse even to consider Lovaas style ABA for Zachary despite the fact that it has been demonstrated to be effective for him. *Id.*

12. The court finds Lisa Holder credible.

13. The court finds Tamilla Burt credible.

14. The court finds Philip Deal credible.

15. The court finds Maureen Deal credible.

16. The court finds Donna Palmer, a HCDE school psychologist, credible.

17. The court finds Judy Bailey, a behavior analyst and the Associate Director of Professional Support Services with the TEAM Evaluation Center, credible.

18. The court finds Tracey Lynn Ford, the mother of an autistic child who had received HCDE services, credible.

19. The court finds Jan Marie Lewis, a speech and language service provider for HCDE, to be credible.

20. The court finds Scott Hooper a school psychologist with HCDE not credible. When he testified, Mr. Hooper demonstrated that he would go to any length to testify favorably for HCDE. He often took very strong positions favorable to the HCDE in areas and on subjects where he had little or no knowledge or expertise. For example, he enthusiastically criticized the Lovaas style ABA even though he had never taken the time to observe a complete session; Tr. 5851; and significant parts of the record in this case before he testified. Tr. 6024, Tr. 6034, Tr. 6040-41. *See also*, Tr. 5860, wherein Mr. Hooper touts an alternative to Lovaas style ABA when the alternative had no research foundation or support whatso-

ever. He did this while simultaneously criticizing the Lovaas methodology because of perceived flaws in the research study design.

II. FINDINGS OF FACT

Having weighed the credibility of witnesses and based on the record in this case, the court finds the following facts:

1. Zachary Deal was born on July 11, 1984 and moved to Tennessee with his parents when he was 18 months old. Tr. 1247-48.

2. At 2 years of age his parents, Philip and Maureen Deal discussed their concern that Zachary could not speak with their pediatrician. Tr. 1247-48.

3. At this same period of time, his mother became concerned that he might be autistic and began seeking out information on that condition. Tr. 1249.

4. Mr. Deal also sought help and was referred to Dr. Susan Speraw. Tr. 1252

5. Dr. Speraw has a Ph.D. in Clinical Psychology and has taught developmental psychology at the University of Tennessee College of Medicine. Tr. 42, 46.

6. Dr. Speraw was qualified and accepted by the Hamilton County Department of Education (HCDE) as an expert in developmental pediatrics, psychoeducational testing; autism, and appropriate intervention for autistic children. Tr. 75.

7. Autism is a neurological disorder that impacts a child's ability to communicate, to process information, to form social relationships; and to interact with the world. Tr. 54.

8. Autistic children need intensive instruction to learn things that for most people seem to be second nature. Tr. 57.

9. Until the last ten to fifteen years, the traditional view of autism had been that, barring misdiagnosis or unknown factors, an autistic child would remain mentally retarded or cognitively limited for life. Tr. 436.

10. Zachary's parents had Zachary evaluated at the Chattanooga Speech and Hearing Center on February 4, 1997. T. 1252; Ex. 2.

11. The Chattanooga Speech and Hearing Center found Zachary to be delayed from 22-25 months in developing his speech and language and referred the Deals to the Tennessee Early Intervention System (TEIS). Tr. 1252-54.

12. TEIS provides services for special needs children who have not yet reached the age of eligibility for services from their local public school system. *Id.*

13. Although the Deals do not remember receiving a copy, Zachary was also the subject of a physical therapy evaluation during this same period of time. Tr. 1254-55, 3917.

14. The physical therapy evaluation noted "toe walking" but was otherwise unremarkable. Tr. 1255.

15. The Deals also had Dr. Speraw complete a psychological evaluation of Zachary. Tr. 118, 1256.

16. Dr. Speraw could not test Zachary's intelligence because he had not developed to the two year level. Tr. 115.

17. Mr. Jason Palmer of TEIS then prepared an initial plan for dealing with Zachary's deficits. Ex. 3.

18. Based on Mr. Palmer's recommendation, the Deals toured the Siskin Center, a facility serving special needs children. Tr. 1257-58.

19. Mrs. Deal found the Siskin Center to be chaotic and devoid of typically developed preschool children. Tr. 1258-59.

20. The Deals decided on an Individualized Family Service Plan prepared in consultation with TEIS. Tr. 1259-60.

21. The in-home teacher provided by TEIS, made 35 visits to the Deal's home prior to Zachary's third birthday. Tr. 4255-56; Ex. 300.

22. The IFSP prepared by TEIS did not recommend a formal occupational or physical therapy assessment. Ex. 7; Tr. 4255.

23. On February 20, 1997, Mrs. Deal gave TEIS permission to refer Zachary to HCDE. Tr. 1264-65; Ex. 300.

24. Ms. Jane Dixon, an HCDE Special Education Supervisor, met with Mrs. Deal on May 19, 1997 and at the meeting she discussed programs available for autistic children without mentioning the Lovaas style ABA as a methodology for the parents to explore. Tr. 3444.

25. At the time of the May 19, 1997 meeting, TEIS had not forwarded its information to HCDE nor had HCDE taken affirmative steps to obtain it. Tr. 1269.

26. HCDE arranged for an initial assessment of Zachary in June, 1997. Tr. 1272.

27. A number of assessment input documents were prepared in June, 1997. Exs. 15-19, Exs. 21-22.

28. HCDE scheduled an Individualized Education Plan (IEP) Team meeting for July 30, 1997. Ex. 24.

29. HCDE and Zachary's parents completed an initial IEP for Zachary on July 30, 1997. Tr. 1276; Ex. 29.

30. A regular education teacher did not participate in the July 30, 1997 IEP Team meeting. Tr. 3464.

31. Zachary Deal presented as essentially nonverbal in August of 1997, Tr. 3530.

32. Zachary Deal presented with some self stimulation behaviors routinely observed in autistic children such as hand flapping and toe walking.

33. The initial IEP was approved by the Deals and called for a thirty day assessment of Zachary at Ooletewah Elementary School (OES) and called for Zachary to receive two forty-five minute sessions of individual speech therapy per week during the thirty day assessment period. Ex. 29; Tr. 1271, 1277.

34. During the 30 day assessment period, Zachary attended school from 8:30 a.m. until 3:00 p.m. five days a week. Ex. 29.

35. On October 24, 1997 the IEP was revised to include three fifteen minute sessions each day of speech therapy. Exs. 35-38.

36. Ms. Wiessen, the speech therapist provided by HCDE for the 1997-98 school year, kept poor records and lost many of the records she did make in a move. Tr. 1506-07.

37. In August, 1997, Zachary was placed in a Comprehensive Development Class (CDC) at OES. Tr. 1292-93.

38. In August of 1997 the Deals learned about and began exploring Lovaas style ABA as an appropriate methodology for addressing Zachary's special needs. Tr. 3453.

39. Dr. Speraw wrote a letter on October 13, 1997, recommending that Zachary receive intensive one-on-one Applied Behavior Analysis (ABA) training. Ex. 34.

40. Lisa Steele was Zachary's teacher in the CDC class at OES for the 1997-98 school year and Zachary's parents had great confidence in Ms. Steele. Tr. 1293, 3447.

41. The IEP Team felt that Zachary would receive additional support in a CDC class. Ex. 29.

42. The CDC class contained only special needs children and did not include any typically developing children/peers. Tr. 1292-93.

43. The CDC class included children who were developmentally delayed, mentally retarded, language impaired, health impaired, and autistic. Ex. 483; Tr. 3629.

44. Zachary was the least verbal child in the CDC class at OES. Tr. 1323.

45. Lisa Steele communicated with Zachary's parents through daily notes. Ex. 448.

46. Zachary routinely joined in the activities with the other children in the CDC class. Tr. 1428-35.

47. Zachary attended the CDC class five days a week until March when an M-Team reduced his program to three days a week and his parents expanded his Lovaas style ABA program at home. Tr. 1337-38, 1438-41; Ex. 42.

48. Zachary Deal had no significant interaction with typically developing peers while he was assigned to the CDC class at OES. Tr. 1311.

49. A significant percentage of the children in the CDC class modeled inappropriate behaviors. Tr. 1548-50.

50. On March 18, 1998, an M-Team recommended reducing Zachary's hours of attendance at OES to Monday and Wednesday for half of a day and on Friday so that Zachary could devote time to his home Lovaas style ABA program. Tr. 1337-38; Ex. 42.

51. The Deals had Dr. Speraw conduct a second psychological evaluation of Zachary in April, 1998. Ex. 130.

52. On April 28, 1998, an M-Team reviewed Zachary's program and began preparing the IEP for the 1998-99 school year. Tr. 1403; Exs. 48, 50.

53. On May 11, 1998, an M-Team meeting was convened which considered Extended School Year Services for Zachary. Tr. 1403-04; Ex. 56.

54. Parent and HCDE fact and expert witnesses agreed that Zachary is likely to regress over the summer months if he does not continue to receive special education services. Tr. 516-17; Tr. 1001; Tr. 5758-59; Tr. 2823; Tr. 6808. The court finds that Zachary is likely to regress during the summer months unless he receives special education services.

55. At the May 11, 1998 meeting Zachary's parents presented the results of their home based ABA program to HCDE personnel and asked that HCDE fund the program. Tr. 1457; Ex. 56.

56. At the May 11, 1998 IEP meeting, Sandra Jerardi told the Deals that there were certain things she would like to give (Zachary) but that she could not because she could not give the same service to everybody. Tr. 2951.

57. The Deals agreed with the ESY program for the summer of 1998. Ex. 66.

58. In May of 1998, Zachary's parents requested data on the efficacy of the HCDE program for autistic children but were never provided with any such data. Tr. 3803.

59. The summer program for Zachary for the summer of 1998 did not include Lovaas style ABA services. Ex. 66.

60. Prior to the Deal's request that HCDE pay for Zachary's ABA program, HCDE personnel were complimentary of Zachary's progress with ABA. Tr. 3681.

61. No HCDE personnel ever discussed with Lisa Steele, Zachary being assigned to a regular education classroom. Tr. 1485.

62. Summer services were appropriate for Zachary for the summer of 1998. Tr. 1344-45.

63. The HCDE has consistently rejected providing Lovaas style ABA services to Zachary or any other student in their system. The school system primarily hinges its steadfast refusal to even consider this methodology on its belief that Lovaas style ABA has not been scientifically proven to be effective. Tr. 1271;

64. Lovaas style ABA is an organized systematic approach to teaching based on operant conditioning and requires the systematic collection of data on the child's acquisition of discreet skills. Speraw at Tr. 235.

65. Lovaas style ABA seeks to understand behavior, predict behavior and the direction it will change, and control the change in behavior. Tr. 436.

66. Lovaas style ABA teaches autistic children how to organize information in their environment. Speraw at 236.

67. Dr. Ivar Lovaas of UCLA conducted an intervention in the 1980's that included intensive, one-on-one discreet trials in an ABA format for an experimental group of preschool children diagnosed with autism and compared the results to a control group which did not receive the intensive ABA intervention. Ex. 63.

68. Virtually all children made significant progressed [sic] within Lovaas' experimental group and recorded IQ gains. The 47 percent termed "best outcome" achieved dramatic IQ gains and were later described in a follow-up report done in 1993 as "indistinguishable" in the regular education setting. Ex. 63.

69. The Lovaas style ABA methodology relies on intensive one-on-one early intervention, and the earlier the better. Tr. 410.

70. Children with testable IQs below 35 and children with multiple handicapping conditions are much less likely to achieve positive outcomes from a Lovaas style ABA intervention. Tr. 532.

71. The Surgeon General of the United States has endorsed the Lovaas style ABA methodology as a promising intervention for autistic children. Ex. 473.

72. There are no similar studies or even outcome reports for any other methodology including the "eclectic" model employed by HCDE. Tr. 456.

73. There are no studies that indicate that school systems can blend various methodologies or approaches to teaching autistic children and achieve the same kind of results reported by Dr. Lovaas in his 1987 publication. Speraw at Tr. 114-15.

74. Dr. Speraw had seen significant progress in children with autism who had received an intensive ABA intervention. Tr. 120.

75. The evidence shows that Lovaas style interventions of ten hours per week or less have no effect. Tr. 520;

76. Following the 1987 publication of the Lovaas program and results, the same type of progress was observed for children in Northern California who had received Lovaas style ABA versus little or no progress in children who had received more standard interventions. Tr. 473.

77. Similar results were also reported by Dr. Sven Eikeseth. Ex. 317.

78. The federal government has funded replication sites to test the validity of Lovaas reported results. Tr. 460-61; Tr. 643-44; Ex. 316.

79. The results from one such site, the Wisconsin Young Autism Project, appear to replicate the original Lovaas findings. Ex. 316, Tr. 642.

80. There is no study in the field of autism more reliable than the Lovaas study and its progeny. Tr. 5121.

81. Dr. Lovaas' study is the most rigorous study in the field of autism interventions to date. *See, e.g.*, testimony of Dr. Ilene Schwartz, a HCDE expert witness on methodologies for treating autism at Tr. 6693-94.

82. The data to date indicate that a Lovaas program of between 20-40 hours per week is required to produce meaningful IQ boosts for autistic children. Tr. 471.

83. In May of 1999, the New York State Early Intervention Committee, after reviewing biological treatments and available educational methodologies for

addressing the needs of autistic children, recommended Lovaas style ABA for young children diagnosed with autism. Tr. 644-47; Tr. 884-85; Ex. 324.

84. Lovaas style ABA is among the best practices available to teach children with autism. Tr. 6713, testimony of HCDE expert, Dr. Ilene Schwartz.

85. HCDE rejects the validity of the Lovaas study and its results and embraces the position of the professionals in the field who have published articles critical of the Lovaas style ABA approach to treating children with autism. See, e.g., Exs. 433, 435, 438, 439.

86. Autistic children who are placed in special education classrooms as opposed to being placed in classrooms with typically developing peers can learn unwanted behaviors from the other and sometimes more challenged special education students. Tr. 750.

87. The Deals decided to fund a Lovaas-style ABA home based program provided by the Center for Autistic and related disorders (CARD).

88. A system for teaching autistic children called TEACCH is a major methodology employed by school systems. Tr. 437.

89. TEACCH was developed at the University of North Carolina and is currently a statewide program within North Carolina. Tr. 437.

90. TEACCH is a cradle to grave support system based on the assumption that the core clinical problems in autism are lifelong. Tr. 439.

91. TEACCH or major components of TEACCH are much more prevalent in HCDE and institutions with which it contracts (e.g., Signal Center, Siskin Center,

TEAM Evaluation Center) than Lovaas Style ABA. Tr. 3434; 4957-58.

92. The HCDE does not have a methodology as such and instead relies on assembling components of other strategies/methodologies for educating autistic children.

93. TEACCH is a humane and effective methodology for addressing the needs of older autistic children and younger autistic children who have not shown or who are incapable of making the progress and IQ gains demonstrated by Lovaas style ABA. Tr. 649.

94. TEACCH is a less expensive methodology for a school system to implement than Lovaas style ABA. Tr. 4976.

95. TEACCH does not address some of the primary deficits of children with autism. Schwartz at Tr. 6707.

96. Dr. Mulick, who has seen and evaluated almost 2,000 children with autism, has only seen children who received intensive Lovaas style ABA become "indistinguishable" in the regular education setting. Tr. 657.

97. Dr. Speraw tested Zachary again on April 27, 1998 after he had received services from HCDE at OES and intensive ABA therapy provided by his parents. Tr. 122-23.

98. Although he became frustrated at times with the test, Zachary's IQ now tested at 93 which is in the average range. Tr. 126-27.

99. The HCDE held an IEP meeting on October 9, 1998 to continue developing an IEP for Zachary for the 1998-99 school year. Tr. 3656; Ex. 102.

100. The October 9, 1998 IEP meeting focused on creating an IEP for the 1998-99 school year. Zachary's parents suggested approximately 600 goals for Zachary and HCDE suggested 78 goals. Tr. 5150.

101. Another IEP meeting was held on October 15, 1998 to finalize an IEP for the 1998-99 school year. Exs. 99, 102, 105, 106.

102. The Deals did not agree with the IEP approved by the IEP team for the 1998-99 school year and filed a minority report. Ex. 113.

103. There was eventual agreement between the HCDE and the Deals on the goals and objectives for 1998-99 but disagreement on Zachary's need for intensive one-on-one ABA instruction. Tr. 4617; Ex. 113.

104. No regular education teacher attended the February 19, 1999 IEP meeting. Ex. 172.

105. Jane Dixon told the Deals that they could not ask questions during the March 3, 1999 IEP meeting. Tr. 3766-68.

106. An M-Team considered the Deals' request for summer services for Zachary for the summer of 1999 and denied any services. Ex. 211.

107. Zachary's parents also requested home based Lovaas style ABA for Zachary's summer program for the summer of 1999. Tr. 1461-62.

108. The HCDE suggested 78 goals for Zachary's 1998-99 IEP. Tr. 5150.

109. Of the 600 goals suggested by Zachary's parents for the 1998-99 school year, 137 were incorporated into the IEP and Zachary accomplished 99 of them. Tr. 5150.

110. Zachary also accomplished 130 of the goals HCDE refused to put into his 1998-99 IEP. Tr. 5150.

111. Ms. Dixon investigated Zachary's parents' dispute with the IEP and interviewed various teachers and providers without interviewing any of the ABA providers even though Lovaas style ABA formed the bulk of Zachary's educational program at that time. Tr. 2414-17.

112. HCDE denied the Deal's request for Lovaas style ABA for Zachary in part because HCDE believes it is more expensive than HCDE's current approach. Tr. 2435-37.

113. Dr. Speraw again tested Zachary on June 2, 1999. Zachary had been receiving 28 hours of intensive one-on-one Lovaas style ABA intervention, two hours a week of speech therapy provided by his parents, and occupational therapy and other services at OES. Tr. 130-132.

114. Dr. Speraw observed a "joy of living" in Zachary in June of 1999 that had not been seen before. Tr. 313.

115. In June, 1999, Zachary was ready to go into a classroom with typically developing peers. Tr. 313.

116. On the June 2, 1999 evaluation Zachary's IQ was recorded at 105, 12 points higher that the previous year. Tr. 134.

117. Dr. Speraw also noted "tremendous progress" in Zachary's interpersonal skills and ability to reason. Tr. 138.

118. Dr. Speraw observed Zachary on March 9, 2000 at the Primrose School and found him to have made significant progress since her evaluation the previous June and saw him interacting appropriately with the

non-disabled children in his 4K class environment. Tr. 176-180.

119. Dr. Speraw has observed at least 50 children who have received a variety of therapies/interventions, including children receiving only HCDE interventions, and has found the ABA approach to be the most effective. Tr. 314.

120. Lovaas style ABA may be cost effective over time by allowing a higher percentage of autistic children to become normal functioning productive adults. E. 311.

121. In addition to the challenge of autism, Zachary suffers from a physical condition known as verbal dyspraxia (sometimes called apraxia) which makes it difficult for him to vocalize. Tr. 98384.

122. CARD employs various sub-strategies for addressing autistic behavior, including discreet trials, prompting, shaping behaviors and responses, reinforcement, differential reinforcement, sequencing of events, and chaining. Tr. 771, 783.

123. CARD encourages socialization by focusing on increasing imitative skills, increasing the ability to follow instructions, and increasing play skills. Tr. 781.

124. The CARD ABA program is a complex, orderly, structured program and Zachary responds well to it. Tr. 3164-73.

125. When the Deals were organizing and funding Zachary's Lovaas style ABA program during the 1997-98 regular school year, HCDE personnel had only positive things to say about the intensive ABA methodology. E.51, pp. 43, 45, 52, 53; E.58, p.61.

126. *Prior* to the Deals requesting funding for Zachary's ABA program from the HCDE, Ms. Sandra Jerardi authored an internal memo in which she described Zachary's program under IDEA as a "sensitive case with regards to school program and/or Lovaas."

127. Based on other testimony in the record supporting the proposition that the HCDE rejects meaningful consideration of the Lovaas style ABA intervention at least in large part because of its perceived cost, the court finds that Ms. Jerardi was flagging Zachary Deal's education program as sensitive because of its probable cost and adverse impact on the HCDE policy of rejecting any and all requests for Lovaas style ABA for young autistic children.

128. At the May 11, 1998 IEP meeting, the Deals outlined the impressive results Zachary had achieved with the Lovaas style ABA methodology and asked the HCDE to fund a continuation of the program over the summer. E.57; E.58, pp. 15, 29.

129. HCDE personnel informed the Deals that "the powers that be" were not implementing ABA programs. E. 58, p. 36.

130. Ms. Jerardi, an HCDE representative and IEP team member in the May 11, 1998 IEP team meeting told the Deals that she wished people would pay their taxes so that HCDE could provide ABA for Zachary. E. 58, p. 79.

131. Jane Dixon told the Deals that the cost of the ABA program is important and that cost was a factor in denying it. E. 150 at p. 21.

132. There was no regular education teacher *of Zachary's* at the October 15, 1998 IEP team meeting even though it was clear that whether or not it would be

appropriate for Zachary to participate in the regular education setting would be a subject of the meeting.

133. Zachary Deal progressed in his ability to function and socialize with other children while at the Primrose School. Tr. 902-925.

134. Zachary Deal was academically one of the better students in Ms. Reyes preschool class at Primrose School. Tr. 908.

135. Anna Davenport, a licensed speech and language pathologist, provides speech therapy to autistic students whose deficits are being addressed by either Lovaas style ABA or TEACCH methodologies. Tr. 1027.

136. Anna Davenport finds that the autistic children who have been receiving Lovaas style ABA intervention have better attention and compliance skills and that they learn better and faster than those receiving the TEACCH program. Tr. 1028.

137. Anna Davenport also has provided speech and language services to autistic children being served with the HCDE program and has found them to have slower progress than those receiving the Lovaas style ABA methodology. Tr. 1030.

138. The regular education teacher who attended the August 25, 1999, meeting left before the 1999-2000 goals and objectives were developed and before the issue of placement was decided. Exs. 253, 256, 259, 260, 265.

139. Zachary responds well to computerized speech augmentation devices. Tr. 1091.

140. Zachary also learns to communicate from other children who are in his environment. Tr. 1129-30.

141. A CARD trained tutor/aide, April Brewer, accompanied Zachary while he was at Primrose School. Tr. 1139-44.

142. The aide/tutor who accompanied him at Primrose School also provided Zachary with some of his home based Lovaas style ABA. Tr. 1144.

143. Tamilla Burt, one of Zachary's ABA tutors, had previously worked at a facility serving autistic children in Missouri. While at that facility, she noted that the children receiving Lovaas style ABA services were able to grasp material much more quickly that those who were not receiving those services. Tr. 3383-84.

144. Over the course of Zachary's program with home based ABA and attending school with typically developing peers at Primrose School, Zachary became less prompt dependent. Tr. 1148.

145. Zachary also fit in well socially with his peers at Primrose School, tried to imitate their behaviors, and, as of April, 2000, some of the children at Primrose School worked to get Zachary to speak. Tr. 1152, 1158-60.

146. As of April, 2000 Ms. Brewer found that Zachary was "learning to learn" at a faster rate. Tr. 1257.

147. Zachary acquired new skills in proportion to the number of Lovaas style ABA hours he received. Tr. 3079.

148. Numerous HCDE witnesses accepted the accuracy of the data maintained by the parents and acknowledged that the Deals never refused a request by HCDE for information about Zachary or his program. *See, e.g.*, E. 108, p.41 and E-103, p.26. The Court finds these data to be accurate.

149. HCDE personnel believe that, if the purported results of the initial Lovaas study could be proven and replicated, that Lovaas style ABA would be the appropriate methodology for preschool autistic children. *See e.g.*, Dixon at Tr. 2379, 2385.

150. Ms. Jane Dixon, a supervisor of special education for HCDE, has, as part of her job, a duty to identify better methodologies for teaching autistic children. Tr. 2524.

151. Ms. Dixon acknowledged that the initial results of the Wisconsin Early Autism Project were surprisingly good. Tr. 2521-23.

152. Despite the excellent reported results from the Wisconsin Project, Ms. Dixon has made no effort whatsoever to contact personnel administering that program. Tr. 2525.

153. If an autistic child has a chance of becoming indistinguishable, it would be inappropriate to set a lesser goal for that child. Dixon at Tr. 2555.

154. As of June, 2000, Sandra Jerardi was making educational decisions and recommendations for autistic children even though she had not read the report of the Wisconsin Early Autism Project which had been made public in 1999 and had been a subject of this hearing for many months. Tr. 2602.

155. Twenty years ago there was no strategy available which educators thought would allow autistic children to function in the normal range or become indistinguishable from typically developed peers. Dixon at Tr. 2713

156. Jane Dixon believes that the parents' proposed goal to make Zachary independent in society with as normal a life as possible is unrealistic. Tr. 2716.

157. HCDE has a policy of not considering Lovaas style ABA for autistic children. Tr. 2941 and Tr. 2958-59 wherein Sandra Jerardi admits to being impressed by Zachary's present levels of performance yet steadfastly refuses to give any credit to Zachary's intensive Lovaas style ABA program for these achievements. *See, also*, Tr. 2966, wherein Ms. Jerardi refuses to concede that any progress is attributable to the ABA program even when the progress was obtained over the course of a summer in which the school system provided no services.

158. In October, 1998, HCDE denied the parents' request for an assistive technology evaluation aimed at determining whether or not Zachary would benefit from an augmentative speech device. Tr. 2980-81.

159. At the May 24, 1999 IEP meeting, Ms. Wiessen, a HCDE speech and language pathologist, acknowledged that Zachary had emerging skills in speech and language. Tr. 3819. Nonetheless, Ms. Wiessen agreed with the decision to deny Zachary speech therapy during the summer of 1999. *Id.*

160. There was no regular education teacher in attendance at the August 20, 1999 IEP Team meeting. Tr. 3821.

161. In March of 2000, Zachary was doing very well with the ABA and classroom exposure he was receiving at that time. Tr. 889.

162. In March of 2000, Zachary had begun to make sounds on a regular basis and attempt to verbalize. Tr. 958.

163. In June of 2000, Zachary's IQ had increased by 26 points over his previous test score. E. 487.

164. The rate at which Zachary has been able to acquire new skills has improved greatly between 1997 and 2000. Tr. 4211-14.

165. The complexity of the skills being acquired has also increased. Tr. 4225.

166. In August of 2000, an IEP was developed providing services for Zachary at Westview Elementary School. Exs. 501, 505.

167. On May 17, 2000 an assessment team convened by HCDE recommended certain assessments/ evaluations for Zachary Deal. Exs. 494, 510.

168. On August 11, 2000 an IEP team developed an extensive IEP for Zachary which called for him, among other things, to attend school at Westview Elementary School and to be assigned to a regular education class. Exs. 501 and 502.

169. While the Deals agreed with the placement at Westview, they continued to maintain that in order for Zachary to receive a FAPE, the school system would have to offer Zachary a Lovaas style ABA program. Ex. 504.

170. Zachary attended Westview Elementary School in the morning on a part-time basis during the 2000-01 school year and participated in a home based Lovaas style ABA program and parent provided speech therapy in the afternoons.

171. Between when Zachary first began ABA in 1997 and the end of 2000, Zachary averaged 24-26 hours per week of Lovaas style ABA interventions.

172. Zachary seems to do best at around 30 hours of ABA per week. Tr. 4227.

173. Zachary's greatest gains occurred during periods when he received no services from HCDE. Tr. 3877; Ex. 487. In fact it occurred over a summer when he attended neither the private Primrose School nor a HCDE facility. Tr. 4636.

174. HCDE refused the Deal's offer to help train HCDE personnel on Zachary's ABA program and protocols. Tr. 4193.

175. As a result of HCDE's refusal to cooperate with the Deal's in learning how to interact with Zachary, the aid assigned to Zachary's class was less prepared than he could have been. Tr. 4201-03.

176. As of September 7, 2000, Zachary had become much more vocal and often was attempting to speak. Tr. 3794.

177. The CARD program, while based on Lovaas style ABA, is not supervised by Dr. Lovaas nor is it a Lovaas replication site.

178. Judy Bailey, the Associate Director of Professional Support Services with the TEAM Evaluation Center, believes it would be extraordinary if the Lovaas results are found to apply to a randomly selected population of autistic preschool children. Tr. 4964.

179. Sandra Jerardi reported that five of the thirty five autistic children with whom she had used the HCDE program became what she termed "indistinguishable.["] Tr. 5253-55.

180. Irise Chapman, Director of Exceptional Education for HCDE, testified that, if the results reported by Lovaas are valid, a FAPE for autistic children should include such a component. Tr. 6454-55.

181. Given the state of knowledge today about autism and its treatment, a well constituted IEP team must have

someone on it who is knowledgeable about Lovaas style ABA and who has an open mind about whether or not to recommend ABA for autistic preschool children. Schwartz at Tr. 6902.

182. Dr. Ilene Schwartz, the HCDE expert on interventions for autistic children, testified and the court finds that, given the state of the evidence today, an intensive ABA program should be a component of Zachary's educational program. Tr. 6902-04.

183. Zachary enjoys and benefits educationally from his placement in the regular education classroom at Westview Elementary. *Observation of the court.*

184. Zachary benefits from the related service of speech therapy as provided by the HCDE at Westview Elementary. *Observation of the court.*

185. Zachary interacts well with his classmates at Westview at recess and in the classroom. *Observation of the court.*

186. Zachary benefits from his privately funded speech therapy with Anna Davenport. *Observation of the court.*

187. Zachary is more engaged in learning during his Lovaas style ABA drills than in any other activity observed by the court. *Observation of the court.*

188. Zachary was more motivated to speak and demonstrated more ability to speak during his Lovaas style ABA session than he did in either of the two formal speech therapy sessions. *Personal observation of the court.*

189. Zachary's preferred learning style is one-on-one Lovaas style ABA. *Personal observation of the court supported by several witnesses during the trial.*

190. Intensive one-on-one ABA "needs to be a component of a program [for autistic children]." Schwartz at Tr. 6908.

191. Dr. Ilene Schwartz, the HCDE expert on interventions for autistic children, believes that eighteen hours a week of intensive discreet trial ABA interventions should be a minimum level for a program for an autistic child similar to Zachary Deal. Tr. At 6923-24.

III. CONCLUSIONS OF LAW

Congress intended for the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.A. 1400 *et seq.*) to guaranty children with disabilities a free appropriate public education ("FAPE"). *Renner v. Board of Educ.*, 185 F.3d 635, 644 (6th Cir. 1999). In determining whether or not a public school system has offered a disabled child FAPE, a court must first determine whether the school system has complied with the procedures mandated by the IDEA. *See, Board of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.3d 690 (1982). In return for accepting federal monies, the IDEA requires states to identify, locate, and evaluate all disabled children residing in the state who are in need of special education and related services. 20 U.S.C.A. § 1412(2)(C).

School districts receiving federal funding under IDEA must establish an individualized educational plan ("IEP") for each child with a disability. 20 U.S.C.A. § 1414(a)(5). Congress further defined an IEP as a written statement developed by a professional qualified to deliver the specially designed instruction, the child's teacher, and the parents of the child. *See*, 20 U.S.C.A. 1401 [sic] § 1401(a)(20).

Placement decisions must be based on the IEP which must contain a statement of measurable annual goals, including

benchmarks or short term objectives. 20 U.S.C.A. § 1400. A legally sufficient IEP must also describe the educational and other services to be provided, and criteria for evaluating the child's progress. *Id; see also, Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 763 (6th Cir. 2001).

The *Rowley* Court stressed that Congress had emphasized that full participation by concerned parties in the IEP process would, in most cases, ensure that much if not all of what Congress wanted in the way of substantive content would make its way into an IEP. *Rowley*, 458 U.S. at 206. Congress did not, however, define "appropriate education" and instead, left it to the courts and the hearing officers to give content to the requirements of an appropriate education. *Id.* at 458 U.S. 187. The *Rowley* Court acknowledged the difficulty (if not impossibility) of defining an "appropriate" education for all learning disabled children. For all such children it set a standard requiring all IEPs to provide at least "educational benefit." *Rowley* at 458 U.S. 201-202.

It did, however, define what constituted a FAPE for children capable of functioning academically within the regular education classroom and able to perform on grade level:

> [T]he IEP and, therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley at 458 U.S. 203-204.

The implementing regulations for IDEA lend further support to the proposition that minimal educational benefit

for a child who is capable of much more does not meet IDEA's requirement of a FAPE:

> Specially designed instruction means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction—
>
> (i) To address the unique needs of the child that result from the child's disability;
>
> (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. . . . 34 C.F.R. Sec. 300.26(b)(3).

Although technical violations will not automatically invalidate an IEP, this circuit requires administrative law judges and hearing officers to strictly review an IEP for procedural compliance. *Dong v. Board of Educ.*, 197 F.3rd 793, 800 (6th Cir. 1999); *see also, Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) and *Burilovich v. Board of Educ. Of Lincoln*, 208 F.3d 560, 567 (6th Cir. 2000). Having assured itself that the process met the requirements of IDEA, a reviewing court or hearing officer must then determine whether the IEP developed by the school system in accordance with the mandated procedures is reasonably calculated to enable the child to receive educational benefits. *Id.* At 206-207. There is no violation of IDEA if the school system has satisfied both requirements. *Rowley* 458 U.S. at 206-207.

Courts are not permitted to substitute their own notions of sound educational policy for those of the school officials. *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990). Instead, courts are to give deference to state and local agencies in choosing the educational methodology *most* suitable to the child's needs. *Rowley* at 458 U.S. 207. Courts

should only intervene where a preponderance of the evidence weighs against the local education agency's decision. *Id* at 206.

Finally, the instant case involves, in part, the parents' request for reimbursement for private placement, and for provision of related services at their own expense. In order for parents to unilaterally alter their child's placement or program and then be entitled to relief under the IDEA, they must establish that the public placement or services offered by the school district violated IDEA and that the private placement or service was proper under the act. *Florence Co. School Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993); *Wise v. Ohio Dept. Of Educ.*, 80 F.3rd 177, 184 (6th Cir. 1996).

The court will first address the procedural violations alleged by the Deals and then take up the substantive allegations.

A. PROCEDURAL VIOLATIONS

Under the first prong of *Rowley*, the Court must first determine whether the HCDE complied with the procedural requirements of the IDEA. The procedural requirements are particulary important because the development and implementation of the IEP are the cornerstones of the IDEA. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-97 [sic], 98 L.Ed.2d 686 (1988). The strict procedural requirements help assure the quality of the resulting IEP.

Under the Act, the IEP must contain a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress. 20 U.S.C. § 1401(a)(20). These are requirements by which the adequacy of the IEP is to be judged. *Cleveland Heights-*

University Heights City School District v. Boss, 144 F.3d 391 (6th Cir. 1998). Minor technical violations which do not affect the adequacy of the IEP may be excused. *Id.*

If the HCDE violated the IDEA's procedural requirements and if those procedural violations caused substantive harm to Zachary Deal, there has been a denial of a FAPE. *See, Metro. Bd. Of Pub. Educ. v. Guest*, 193 F.3d 457, 464-65 (6th Cir. 1999); *Daugherty v. Hamilton County Schools*, 21 F.Supp.2d 765, 772 (E.D.Tenn. 1998). Assuming the court finds a denial of a FAPE, the court may grant such relief as the court determines is appropriate. 20 U.S.C.A. § 1415(e)(2).

The record in this case establishes significant procedural violations of the IEP process as required by the IDEA. Even if the Court were to view the testimony and the evidence in the light most favorable to HCDE, the record clearly establishes that HCDE, in large part because of cost considerations, embraced an unofficial policy of refusing to consider Lovaas style ABA for children who presented with autism as their disabling condition.

The HCDE M-Team personnel consistently went into IEP meetings, where they were legally bound to assess Zachary's disabilities and individual needs before selecting a methodology, with a predetermination to deny Zachary's request for a Lovaas style ABA program. In so doing, the HCDE personnel on the M-Team had "pre-selected" the extant HCDE program regardless of Zachary's demonstrated individual needs. This bias on the part of the HCDE stemmed in large part from concerns about the perceived cost of Lovaas style ABA.

The result was a kind of "virtual" IEP team meeting where the two parties talked past one another rather than cooperating to Zachary's benefit. The court notes that Mr. and Mrs. Deal did request data from HCDE on the HCDE methodology at the meeting where they were first denied the

ABA services for Zachary. The court finds that even had the HCDE produced the data on its success rate with autistic children it would have not changed the outcome. The data produced for the hearing indicate that approximately 14% of autistic children receiving only the HCDE program went on to become "indistinguishable" from the children in regular education classrooms. This does not compare favorably to the 47% rate reported by Dr. Lovaas and apparently being achieved at the replication sites.

The failure of the HCDE to have regular education teachers attend the IEP team meetings is also a troubling procedural violation. The absence of a regular education teacher provides strong evidence that the decision to place Zachary in a special education classroom for the 1999-2000 school year had been made before the IEP team convened.

Zachary's parents had every right to expect and were entitled to a full and fair assessment of Zachary's needs and then an unbiased decision making process within the IEP format to address Zachary's individual needs. This did not happen in this case and the procedural violations themselves amount to a denial of FAPE.

II. SUBSTANTIVE VIOLATIONS

Science and innovation have warred with orthodoxy at least since Galileo was forced to recant in the shadow of the rack. In defending its less expensive and more orthodox choice of services for Zachary, the HCDE cites to the oft quoted *Doe v. Bd. of Educ. of Tullahoma City Schools* where the Sixth Circuit held that schools have complied with the IDEA's requirements if they offer the educational equivalent of a serviceable Chevrolet to a handicapped student rather than a Cadillac.[3] 9 F.3d 455, 459 (6th Cir. 1993). The IDEA

[3] Zachary Deal's situation is clearly distinguishable from the facts in *Doe. John Doe* had been a regular student with a full range IQ score of 130. Testing revealed an auditory processing disorder and the parents

may not mandate a Cadillac for Zachary Deal. It does, however, require the HCDE to make sure whichever vehicle they propose, is fully gassed and capable of arriving at an appropriate destination.

The appropriateness of the destination for a particular disabled child is dependent to a large extent on the child's abilities and potential. In reversing a District Court finding that a school system had provided FAPE by providing more than a "trivial" benefit, the Third Circuit noted:

> The [special] education must be tailored to the unique needs of the disabled student through an [IEP]. IDEA leaves to the courts the task of interpreting "free appropriate education." The Supreme Court began this task in *Board of Education v. Rowley*, holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education and confer "some educational benefit" upon the child for whom it is designed. . . . In determining quantum of educational benefit necessary to satisfy IDEA, the [Supreme] Court explicitly rejected a bright line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student. [The Third Circuit has] rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposed a higher standard." IDEA calls for more than a trivial educational benefit and requires a satisfactory IEP to provide significant learning and

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agreed to allow the school system to develop an IEP for their son after the fall semester had begun and their son had selected his courses. Rather than giving the school the opportunity to develop an appropriate IEP, the parents unilaterally placed him in a private school during the summer recess. The Deals, in contrast to John Doe's parents, fully cooperated with the school system in trying to develop an appropriate IEP.

> confer "meaningful benefit." We also reject the notion that what was "appropriate" could be reduced to a single standard, holding that benefit "must be gauged in relation to the child's potential." When students display considerable intellectual potential IDEA requires "a great deal more than negligible [benefit]."

Ridgewood Board of Educ v. N.E., 172 F.3D 238 (3rd Cir. 1999) (other citations omitted).

A. The school system did not offer a "methodology." The HCDE did not offer to provide Zachary Deal with a proven or even describable methodology for educating autistic children because they had no such methodology to offer. In pre-hearing discovery and in the first days of the hearing, the HCDE termed their methodology the "eclectic" methodology or approach. During the course of the hearing, however, the HCDE witnesses distanced themselves from this label when it became clear that it was indefinable and virtually meaningless as a descriptor for an organized methodology.

The evidence showed that the HCDE actually cobbled together various components from other methodologies, primarily TEACCH[4]. They did so intuitively based on the experience and preferences of individual IEP team members. When forced to produce historical data to demonstrate the efficacy of these past choices, the HCDE could only claim a best outcome success rate one third that of the reported best outcome children in the Lovaas study group.

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[4] There are other methodologies available besides Lovaas style ABA and TEACCH. The HCDE's expert, Dr. Ilene Schwartz testified about her own program, DATA, which also employs one-on-one discreet trial training and stresses data collection and analysis for all its components. The HCDE personnel, such as Ann Kennedy and Sandra Jerardi, who should be exploring improved and proven methodologies for educating autistic children demonstrated an appalling lack of interest in the more innovative and undoubtedly more expensive programs.

If their intuition and experience were telling them that their choices for autistic children were as good as or better than the Lovaas style ABA, they were misleading themselves.

Surprisingly, neither these data comparisons, the reported favorable results from the Lovaas replication sites, nor Dr. Schwartz's testimony that all educational methodologies for autistic children should include one-on-one discreet trial training, moved the HCDE in its opposition to intensive one-on-one discreet trial training. This steadfast resistence to one-one-one ABA in the face of the mounting favorable evidence for Lovaas style ABA provided further evidence that the HCDE's insistence on rejecting Lovaas style ABA for Zachary is based primarily on its perceived cost.

The record, as developed by both the parents' and the school system's witnesses, showed the most widespread methodology, TEACCH, is gradually losing ground in the special education community more [sic] effective methodologies, such as Dr. Schwartz's program, which employ one-on-one ABA as a chief component. There was no evidence whatsoever produced to indicate that intensive one-on-one discreet trial training was somehow *less* effective than more orthodox methodologies. The HCDE also failed to produce convincing evidence that their methodology for young children with autism was equal to or better than a program based primarily on an intensive ABA intervention. The preponderance of the evidence weighed heavily in favor of Lovaas style ABA as the appropriate methodology for educating Zachary Deal.

B. The home based Lovaas style ABA program is a recognized methodology. The Deals learned of the Lovaas style ABA program on their own. The court finds this significant because, given its demonstrated effectiveness and the widespread knowledge within the HCDE of its spreading use with autistic children, it is difficult to explain how a school system, which claims to have been open to any methodology which would address Zachary's unique needs, would dismiss

this approach outright without even discussing its perceived advantages and disadvantages with the Deals. Given the state of knowledge about methodologies appropriate for educating autistic children, the HCDE school system representatives should have at least informed the parents about the Lovaas style of ABA and explained why they would recommend against it.

Having learned of the Lovaas style ABA methodology on their own and having funded the initial months of Zachary's program, the Deals were convinced by Zachary's progress that this was the appropriate methodology for Zachary. When the Deals met with HCDE to develop Zachary's 1999-2000 IEP, the school system was confronted with the parents' reports of Zachary's remarkable progress utilizing the Lovaas style ABA with Zachary as well as Dr. Speraw's letter of October, 1997 recommending an ABA approach for him. It was during this meeting that the HCDE's representative told the Deals that there were things she wished she could recommend for Zachary but then she would have to give them to everybody.

HCDE's refusal to consider Lovaas style ABA for Zachary for the 1999-2000 school year is even more inexplicable. Zachary's parents had fought to have 600 goals included in Zachary's IEP for the previous school year, 1998-99. The HCDE had suggested 78 goals and the parties eventually agreed to include 137 of goals on the 1998-99 IEP. When the parties sat down to develop the IEP for 1999-2000, they knew that the primary teaching methodology for Zachary had been a home based intensive Lovaas style ABA program and that Zachary had accomplished 99 of the 137 goals on his previous IEP and an additional 130 of the goals HCDE had rejected for his 1998-99 program.

The HCDE had its program in mind when it suggested 78 goals for 1998-99. Zachary had actually accomplished 229 of the 600 goals his parents had set for him and had

clearly succeeded beyond HCDE's expectations for him by accessing CARD's Lovaas style ABA program. There is no case law which stands for the proposition that the term "appropriate" as it pertains to FAPE sanctions a program which would actually retard a special needs child's education or development.

The court finds that an appropriate educational methodology for Zachary Deal must include an intensive Lovaas style ABA component. The evidence at trial, however, did not demonstrate that a 40 hour per week ABA program is required in order for Zachary to succeed. In fact, the testimony indicated that Zachary does best on a 30 hour per week program.

C. Extended school year services are needed. The amount of regression suffered by a child during the summer months, considered together with the time required to recoup lost skills when school resumes in the fall, is an important consideration in assessing an individual disabled child's need for a structured educational program in the summer months. *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). Demonstrated regression, however, is not the only criterion. The school officials must also consider predictive data based on the opinion of professionals in consultation with the child's parents. *Id.* at p. 1028.

The IDEA's implementing regulations specifically state that:

> A public agency may not use a parent's refusal to consent to one service or activity. . . to deny the parent or child any other service, benefit, or activity of the public agency. . . .

34 C.F.R. Sec. 300.505(3)(e).

The HCDE apparently believed Zachary might suffer regression when they approved extended school year ("ESY") services for him in 1998. There is no evidence in the record

whatsoever to indicate that this threat of regression has abated. Why then has the HCDE steadfastly denied ESY services to Zachary since the summer of 1999?

The HCDE personnel testified that the denial was because there was no program to extend. In denying ESY related speech therapy services for the summer of 1999, Ms. Dixon noted that any *lack of progress* on Zachary's part was due to his not having accessed the full HCDE program. His classroom teacher, Ms. Wiessen, tried to justify the denial on the basis that she could not document regression and the fact that he *was making progress* accessing HCDE services on a part-time basis.

The expert and fact witness testimony in this case was unequivocally consistent: Zachary Deal would have regressed without summer services. The threat of regression did not change between the summer of 1998 and the summer of 1999. What changed was the relationship between the parents and the HCDE once the dispute began over Zachary's need for Lovaas style ABA. The school system had no quibble with related speech therapy during the summer of 1998 when Zachary's parents were paying for his ABA program. The problems arose when the Deals asked the HCDE to fund not only related services during the summer of 1999 and 2000, but, when they demanded that the school system also fund a Lovaas style ABA program for him.

Summer services, like services during the regular school year, are intended to address the child's needs. The concept is even labeled "extended school year" not "extended school program." A summer IEP, like any other IEP, should address the individual and unique needs of the eligible child. The HCDE is in error when it maintains that the purpose of ESY is to continue an existing IEP and that, if there is no agreed upon IEP, there is nothing to continue. The purpose of ESY, like the rest of the IDEA and its implementing regulations, is to educate disabled children. The need for and design of an

ESY program begins with an assessment of the child's needs, not the level of cooperation between the school system and the child's parents.

III. REIMBURSEMENT

The IDEA's grant of equitable authority empowers an administrative law judge or hearing officer to order school authorities to reimburse parents for their expenditures on private special education for a child if the administrative law judge or hearing officer determines that such placement, rather than a proposed IEP, is proper under the Act. *School Comm. of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369, 102 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). Congress intended that disabled children's needs would be met either in public or private institutions through cooperation between the parents and school officials within the IEP process. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364, 126 L.Ed.2d 284 (1993). In cases where cooperation fails, however:

> [P]arents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. For parents willing and able to make the latter choice, it would be an empty victory to have a court tell them several years later that they were right but these expenditures could not in a proper case be reimbursed by the school officials. Because such a result would be contrary to IDEA's guarantee of a "free appropriate public education" we [hold] that Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Florence County School Dist. Four v. Carter, at 510 U.S. 12, *quoting, School Comm. of Burlington v. Department of Ed. Of Mass., supra.*

Parents who make this choice do so, however, at their own financial risk. *Id.* at 471 U.S. at 374. The Deals took a considerable financial risk when they embarked upon Zachary's home based ABA program. Early on in their dispute with the HCDE they asked for outcome data to support the program HCDE was offering Zachary. None were produced until this hearing and the ones that were produced offer little comfort to a parent of a child who falls on the autism spectrum where Zachary falls. Experts on both sides testified that selecting the wrong methodology for an autistic child can mean the difference between an independent adult life and a lifetime of dependency and support.

The Deals made a correct and legally defensible choice when, in the face of the school systems unbending intransigence, they opted to continue the successful ABA program Zachary had been receiving. The Deal's are entitled to reimbursement for some, but not all, of their expenses in providing direct and related educational services for their son. The court will address reimbursement issue by issue within this order.

IV. THE SPECIFIC ALLEGED VIOLATIONS

The court has already addressed the major issues in the case and the facts and law surrounding each issue. Some of the many violations alleged by the Deals were either disposed of by interlocutory orders of the court or by agreement of the parties during the hearing. We now turn to the specific alleged violations remaining for adjudication.

COUNT 1. The county failed to timely and properly evaluate Zachary's individual needs requiring the Deals to obtain the evaluations at their own expense.

The record supports a finding that any alleged delays in evaluating Zachary for occupational services were excusable given the information supplied to the school system by the Deals and Zachary's levels of performance in that area. Exs.

16, 17, 21. In addition, the Deals had already obtained a private occupational therapy evaluation which did not recommend any one on one occupational therapy. Ex. 298. Furthermore, the Deals and the HCDE worked together to accomplish a series of evaluations, some of which were delayed because of difficulty obtaining a neurological evaluation. Finally, there is little evidence of any significant adverse impact on Zachary from these alleged delays. The court therefore DENIES the parents' request for reimbursement for evaluations.

2. *Even though it was Zachary's proven learning style, the county refused to consider any one-on-one ABA therapy.* The court has already addressed this issue at length.

Zachary's parents presented detailed evidence documenting the fact that Zachary had already made remarkable progress in the CARD program when they first asked the HCDE to consider it for Zachary's summer 1999 program. The court FINDS that on a procedural basis the HCDE's refusal to even *consider* Lovaas style ABA for Zachary during this and subsequent IEP meetings denied Zachary Deal a FAPE. The court also FINDS that even had the HCDE given full and fair consideration to Zachary's proven learning style, denying Zachary Lovaas style ABA at the point in which it was requested would have been a substantive denial of FAPE. Accordingly, the court FINDS that a free appropriate public education for Zachary Deal should have included at least 30 hours of intensive Lovaas style ABA and must include at least the same level of ABA instruction until such time as there is demonstrable evidence, including present levels of performance and expert opinion by proponents of the Lovaas approach, that the intensity level should be reduced or eliminated. The court ORDERS the HCDE to reimburse Zachary's parents for the weekly costs of his home based ABA program up to and including thirty hours of service for each week he received such services after May 11,

1998. This requirement remains in effect until such time as the HCDE has convened a properly constituted IEP team, which shall include at least one expert in and advocate for Lovaas style ABA, and produced an IEP for Zachary Deal which shall include at least 30 hours of Lovaas style ABA for Zachary per week to be provided either at home or in a suitable, non-distracting environment in his assigned school.

COUNT 3. The goals and objectives proposed by the county are uniformly vague and are not objectively measurable to be able to ascertain progress. The goals and objectives proposed by the Deals were watered down to fit the county's administrative needs, i.e. to fit the existing classrooms the county has available rather than to fit Zachary's individual needs.

The HCDE witnesses testified that they had been criticized by state auditors for putting too many goals on an IEP. There is no legal support for assigning an arbitrary limit to the appropriate number of goals for Zachary. Because the real issue was between the detailed goals and objectives that were part of his ABA program and the more general goals traditionally used by the HCDE, this issue should resolve itself with the inclusion of Lovaas style ABA in his IEP's. The county's resistence to goals based on the number of them is further evidence, however, of procedural violations in the IEP process.

COUNT 4. The county failed to offer Zachary a full continuum of options and what few prepackaged options have been presented are "offered" by the county on a take it or leave it basis.

This issue is subsumed in and has been addressed in other counts.

COUNT 5. Did the county fail to provide Zachary with meaningful and appropriate opportunities for inclusion to the maximum extent appropriate.

Congress intended that disabled students be educated in the least restrictive environment. The IDEA explicitly requires:

> To the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. §1412(a)(5)(A).

The parents agreed to the placement in the 1997-98 school year and in fact wanted Lisa Steele as Zachary's teacher. The real contention arose for the 1998-99 school year when the parents wanted significantly more inclusion for Zachary with typically developing peers. The HCDE did not discuss options that would have provided more exposure with typically developing peers with the Deals and the record indicates a policy of indifference to this legal requirement. At this point, however, there is no remedy for Zachary having missed opportunities to interact with typically developing peers in the 1998-99 school year.

By the time of the August, 1999, IEP meeting, however, there was no evidence that Zachary could not tolerate and benefit from significant exposure and interaction with typically developing peers. The fifteen minutes three times a week of inclusion offered as a starting point by the HCDE for the 1999-2000 school year appeared to be based on a policy of starting at the low end of the scale and working up. Ex. 265. The stated goal in the IEP discussion of perhaps reaching an hour a day of inclusion by the end of the year further supports evidence of a policy of gradualism.

The law clearly requires the school system to educate Zachary with typically developing peers to the maximum extent possible. The HCDE did not develop his 1999-2000 IEP with this in mind. It offered, basically, a year of education in a CDC classroom where every single child was disabled.

The parents unilaterally removed Zachary from the HCDE system and placed him in a regular education 4-K class at the private Primrose School. The court reviewed video tapes of Zachary at the Primrose School and, notwithstanding the quibbles and hyper-criticism of the tapes by HCDE witnesses, found Zachary to be well integrated into his class and learning to interact with his regular education classmates. His classmates had obviously accepted him and everyone seemed to benefit from having Zachary in the classroom.

The benefits of the Primrose School experience were even more apparent when the court visited Zachary at the HCDE Westview Elementary School at the conclusion of this hearing. His level of participation and involvement had continued to increase to the mutual benefit of all the children in his class.

That said, the parents are not entitled to reimbursement for the costs of the Primrose School. The Deals removed Zachary without giving the HCDE the required statutory notice. 20 U.S.C.A. § 1412(a)(10)(C)(ii). There is no way of knowing whether or not the HCDE would have modified the inclusion component of Zachary's IEP in the face of the Deals' decision to place him in a private school. Having denied the HCDE the opportunity to modify that part of the IEP, the Deals are not now entitled to reimbursement. The claim for reimbursement for the cost of the Primrose School is DENIED.

COUNT 6. The county failed to even provide services it expressly agreed to provide to Zachary and the county used certain service providers without the appropriate knowledge of, expertise in, and experience with Zachary's educational needs.

The HCDE's performance in evaluating Zachary for and providing related services in occupational therapy and speech therapy is disappointing. For the 1997-1998 school year some of the HCDE records have apparently been lost in a move. However, the testimony at trial and the records that do exist, indicate that while some speech therapy was provided, it was neither in the amounts required by the IEP nor was it always the one-on-one speech therapy the parents had a right to expect. Exs. 29, 35, 37, 51, Tr. 2217.

The occupational therapy agreed to for the 1998-99 school year was to have been for one hour every other week. Ex. 105. The record shows that Zachary received only five thirty-minute sessions between October 15, 1998 and the end of the school year. Exs. 206, 265.

Speech therapy for 1998-99 was to have been one-on-one twice a week for thirty minutes and group therapy each day. The record at trial showed that these services did not actually begin until over four months into the school year. Exs. 289, 454, 453, 150, 181. The HCDE again agreed to provide occupational therapy, physical therapy, and speech therapy for Zachary for the 1999-2000 school year. Exs. 260, , [sic] 265, 270. The HCDE then withdrew its agreement to provide the services because the Deals refused to accept the entire IEP the HCDE offered The court has already held that the IEP produced by HCDE for the 1999-2000 school year was both procedurally and substantively defective and denied Zachary Deal a FAPE. As the IEP denied FAPE, the Deals were under no obligation to accept it in its entirety. The court FINDS that the HCDE mishandled its obligation to provide the related services of physical therapy, occupational therapy, and

speech therapy to Zachary Deal. The court ORDERS the HCDE to reimburse Zachary's parents for any out of pocket costs they have incurred in providing any such related services for Zachary. This includes services currently being provided and extends until such time as a properly constituted IEP team produces an IEP which conforms to this order. The court finds, however, that the HCDE is not responsible for reimbursing the Deals for the costs of the following examinations/evaluations: (1) the neurological evaluation by Dr. Miller, which was in the nature of a medical examination and not part of the IEP process, (2) the speech and hearing evaluation of February 4, 1997 which was done before Zachary's third birthday. (3) The October 2, 1999, occupational therapy evaluation by Karan Wilson, for which the Deals had never asked for reimbursement. The report by Dr. Mulick dated June 2, 1999 is in the nature of costs for this hearing and should be addressed in that forum.

COUNT 7. Are Zachary's parents entitled to reimbursement for the cost of Zachary's tuition and related expenses for attendance at the Primrose School in the 1999-2000 school year and for the costs of related services including ABA therapy from July, 1997 through May 31, 2001?

This issue has already been addressed in findings related to other counts.

COUNT 8. The county failed to provide ESY services for 1999 and 2000.

This issue has already been addressed by the court.

COUNT 9. Does the IEP of August 11, 2000 offer a free appropriate public education to Zachary, subject to the addition of assistive technology goals and objectives, and, if not, is petitioner entitled to reimbursement for the cost of one-on-one applied behavior analysis services and one-on-

one occupational therapy services that the parents have purchased and continue to purchase during the 2000-2001 school year?

This count as already been addressed by the court.

COUNT 10. Do petitioner's parents have the right to select or veto the selection of providers of special education and related services by HCDE as the public agency responsible for implementation of the petitioner's IEPs?

The Deals have no right to veto competent providers of services called for in a properly constituted IEP.

COUNT 11. To what extent must HCDE allow the participation of petitioner in the public education program offered by HCDE under the circumstances that his parents are unwilling to accept the entire IEP of August 11, 2000?

This count has already been addressed by the court.

The court FINDS that ZACHARY DEAL is the prevailing party.

This decision is binding on both parties unless the decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty days of entry of a final order in a non-reimbursement case or three years in cases involving educational cost and expenses. In appropriate cases the reviewing court may stay this final order.

IT IS SO ORDERED THIS 20th DAY OF AUGUST, 2001.

/s/ A. James Andrews
A. JAMES ANDREWS
Administrative Law Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Apr. 1, 2005]

No. 03-5396

MAUREEN DEAL, ET AL.,
Plaintiffs-Appellants

v.

HAMILTON COUNTY BOARD OF EDUCATION
Defendant-Appellee

ORDER

BEFORE: MOORE and COLE, *Circuit Judges*; and MARBLEY,* *District Judge*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

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* Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Supreme Court, U.S.
FILED
SEP - 7 2005
OFFICE OF THE CLERK

(3)

No. 05-55

IN THE

Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Petitioner,

v.

MAUREEN DEAL, PHILLIP DEAL
Parents on Behalf of ZACHARY DEAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, TENNESSEE SCHOOL BOARDS ASSOCIATION, AND TENNESSEE ORGANIZATION OF SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITIONER

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MAUREEN DEAL, PHILLIP DEAL
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, TENNESSEE SCHOOL BOARDS ASSOCIATION, AND TENNESSEE ORGANIZATION OF SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. NSBA's Council of School Attorneys includes approximately 3,000 school attorneys responsible for representing and advising local school districts on legal matters, including compliance with the federal laws

governing special education. Recognizing that all children, including those with disabilities, have a right to be provided with free appropriate public education, NSBA has consistently supported the rights of disabled children, while at the same time being painfully cognizant of the significant funds that its members spend each and every year, above and beyond that provided by the federal government, for the education of those children – and of the hard choices that this forces among services to children, including among disabled children.[1]

The American Association of School Administrators (AASA), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The Tennessee School Boards Association (TSBA), founded in 1939, is a not-for-profit organization created exclusively for charitable and educational purposes, and it has been recognized by the Tennessee Legislature as "the organization and representative agency of the members of school boards of Tennessee." TSBA's membership is comprised of 135 county, city, and special school district boards of education throughout the state. The purpose of TSBA is to to work for the general advancement and improvement of public education in Tennessee.

The Tennessee Organization of School Superintendents (TOSS), founded in 1970, is the professional association representing all of Tennessee's 136 local school district

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all parties, whose letters of consent have been lodged with the Clerk.

superintendents. TOSS's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. TOSS's members support equal educational opportunity and hold fast to the belief that a uniform body of law assists them in their day-to-day duties managing schools that serve approximately 850,000 students.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. § 1400 *et. seq.*, places on states and local educational agencies "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 207 (1982). *Amici*'s members are the local educational officials who are on the front lines of providing educational services to all children attending public schools, including the 6.4 million children with disabilities who receive special educational services through IDEA. U.S. Dep't of Educ., Digest of Education Statistics 2003, Table 54 (Dec. 2004). *Amici* are committed to educating children with disabilities in order to meet the requirements of IDEA, and more importantly, to provide the best education possible to all children in their care. In providing these special educational services, *amici* seek a uniform federal standard for determining whether states and school districts have met their obligations under the Act that accords the respect called for by Congress to the judgment of educational professionals who implement the Act.

The decision below, if allowed to stand, will hamper *amici's* efforts to provide educational services to students with disabilities in two important respects. First, the subjective "meaningful benefit" standard adopted by the Sixth Circuit below, along with a minority of the courts of appeals, will breed uncertainty as to whether an individualized education program (IEP) will be found to pass muster by a reviewing administrative law judge (ALJ) or court. School district personnel who are primarily

responsible for developing IEPs require a consistent, objective standard by which reviewing authorities will determine whether those IEPs provide a free and appropriate public education as required by the Act. Second, the predetermination standard adopted by the Sixth Circuit will discourage school district personnel from the type of thorough preparation that should be encouraged prior to an IEP meeting. The predetermination standard established by the court of appeals also allows parents to dictate the educational services to be included in an IEP as long as they advocate for one, and only one, educational program as beneficial for the child.

The circumstances in which this case arises makes it an ideal vehicle in which to address those concerns. The disabled child at issue has been diagnosed with an autistic disorder. Autism is increasingly prevalent among American youth for reasons that are the subject of great debate among the medical community. While there are a number of educational programs that have been shown to be effective in teaching children with autism, educational researchers continue to debate which of these programs is most effective for children with autism and in which circumstances. This is exactly the situation in which this Court in *Rowley* cautioned that the "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. The decision below not only invites federal courts to make value judgments about which educational methods from among several effective strategies should be pursued, but in essence transforms the federal courts into the ultimate arbiters of complex educational and medical determinations. That result has generated a direct conflict among the circuits, is at odds with Congress's intent, and should be reviewed by this Court.

Amici urge this Court to grant *certiorari* to establish uniform federal rules to be used by the federal courts in deciding these important issues that take into account the important principles of federalism on which IDEA is grounded.

REASONS FOR GRANTING THE WRIT

I. THE SUBJECTIVE "MEANINGFUL BENEFIT" STANDARD ADOPTED BY THE COURT OF APPEALS DEVIATES FROM *ROWLEY* AND CREATES UNCERTAINTY FOR STATE AND SCHOOL DISTRICT PERSONNEL

The heart of IDEA is its requirement that school district officials develop, for each student with a disability, an IEP designed to provide the student with a free appropriate public education (FAPE). 20 U.S.C. 1412(a). *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Missouri Dep't of Elementary & Secondary Educ. v. Springfield R-12*, 358 F.3d 992, 998 (8th Cir. 2004); *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 11-12 (1st Cir. 2003). In *Rowley*, this Court held that a State provides FAPE by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. The Act requires "that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added). *Rowley's* "some educational benefit" standard establishes a clear, objective standard that has been recognized and faithfully applied by a majority of the courts of appeals. Pet. 11-12. This standard requires reviewing ALJs and courts to make an objective and clear-cut determination as to whether an IEP is designed to provide *some* educational benefit.

The "meaningful benefit" standard adopted by the Sixth Circuit below and a minority of the courts of appeals, by contrast, establishes an inherently subjective standard. *See, e.g., Shore Reg. High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-809 (5th Cir. 2003); *Adams v. Oregon*, 195 F.3d 1141, 1149-1150 (9th Cir. 1999). There are no clear guideposts for federal courts in determining whether an IEP provides a "*meaningful*," as opposed to "*some*," benefit. A standard that requires

determination of whether the benefit provided is "meaningful" can do nothing other than send reviewing ALJs and federal courts on a subjective quest for whether the benefit provided by an IEP is "meaningful," without any guidance for the point at which the standard is met.

The lack of any ascertainable standard for what is a "meaningful benefit" creates uncertainty for the school district personnel responsible for developing an IEP. Moreover, it will require federal courts to make complex, value-laden judgments about the effectiveness or desirability of educational techniques that may be the product of different schools of thought and subject to ongoing debate among educational and medical professionals. As this Court recognized in *Rowley*, however, "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of education policy.'" 458 U.S. at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

There also is no reason for courts to second-guess the determinations of school districts and states by applying a subjective "meaningful benefit" standard when Congress has already provided extensive protections for students with disabilities. To ensure that disabled students are provided with FAPE, Congress required school districts and parents together to develop a rigorous and individualized education plan for each student. *See* 20 U.S.C. § 1414(d). These IEPs are highly specific. For example, each IEP must set forth accountability measures, including annual and short-term objectives, to make sure that the school districts are meeting the students' needs. *Id.* § 1414(d)(1)(A)(ii). Not only must school districts closely track the progress of each student toward meeting the goals set forth in their IEPs, but the districts also must keep parents apprised of their child's progress. *Id.* § 1414(d)(1)(A)(viii). The IEP also specifies exactly what special education and related services each student will receive. *Id.* § 1414(d)(1)(A)(iii). By following these requirements under IDEA, school districts across the

country are providing significant benefits to students with disabilities and being held accountable if they do not.[2]

A "meaningful benefit" standard can only be expected to encourage litigation by parents who are dissatisfied with an IEP and are willing to take the chance that an ALJ or district court on review will determine that the educational benefit provided by an IEP is not "meaningful." In contrast to an objective, "some benefit" standard, a subjective "meaningful benefit" standard may encourage parents to pursue IDEA litigation in the hopes that they will eventually obtain a federal judge who agrees that a particular educational program is more desirable than another program, even if both programs provide objective educational benefits to a disabled child.

To the extent litigation is encouraged by the "meaningful benefit" standard, it will only serve to put further pressure on already scarce educational resources. In the 1999-2000 school year, school districts spent an estimated $146.5 million on special education mediation, due process, and litigation activities. Special Education Expenditure Project, Am. Inst. of Research, What Are We Spending on Procedural Safeguards in Special Education, 1999-2000? 5 (May 2003). Of course, resources school districts are required to expend in litigating questions under the Act are not available for providing educational services to students.

The importance of adhering to *Rowley's* objective standard for determining whether an IEP is designed to provide FAPE is heightened in the context presented by this case—providing special education services to a child who has autism. The increasing prevalence of children diagnosed with autism, the ongoing debate over effective educational methods to serve children with autism, and the cost of providing those services all provide an important backdrop for the issues presented by this case.

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[2] These requirements are long standing and were unchanged by the Individuals with Disabilities Education Improvement Act of 2004.

The number of children served under IDEA who have been diagnosed with autism has increased exponentially over the last ten to fifteen years. United States Department of Education, Number of Children Served in the 50 States and D.C. under IDEA, Part B, Age 6-21: By Age Group and Disability 1990 through 2003 (reporting that the number of individuals with autism aged 6 to 21 in the United States increased from about 5000 in 1991 to over 140,000 in 2003).[3] The causes and significance of the increase in the prevalence of autism are in dispute among medical professionals.[4] Nevertheless, the in-classroom reality remains that educators and school systems are faced with rapidly growing numbers of students classified as autistic who require special educational services.[5]

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[3] Critiques of the Department of Education's data tracking methods for the autism prevalence rate have surfaced recently, reflecting the larger debate within the scientific community about the causes and significance of this trend. *See, e.g.*, James R. Laidler, *US Department of Education Data on 'Autism' are not Reliable for Tracking Autism Prevalence*, 116 Pediatrics 1, e120-e124 (July 1, 2005) (suggesting that the increased autism prevalence rate is related more to differences in definitions used to classify a child as autistic for IDEA purposes in different states than an actual increase in autism prevalence).

[4] *Compare* Laidler, *supra*, with Mark F. Blaxill, *What's Going On? The Question of Time Trends in Autism*, 119 PUB. HEALTH REP. 536, 549 (2004) (arguing that although at least a portion of the higher autism prevalence rate is likely due to definitional variations over time and an increased awareness of the disorder, there is "little evidence that systematic changes in survey methods can explain these increases [in autism prevalence rates], although better ascertainment may still account for part of the observed changes").

[5] Individual states have been affected to different degrees by this trend. For example, a study commissioned by the California state legislature reported a 272.93 percent increase in the number of autistic individuals registered with the California developmental center system from 1987 to 1998. California Health and Human Services Agency, Changes in the Population of Persons with Autism and Pervasive Developmental Disorders in California's Developmental Services System: 1987 through 1998 6, 8 (Mar. 1, 1999).

The cost of providing special education services for this rapidly growing population of autistic, and other, children with disabilities, falls primarily upon state and local governments. Although the federal government has committed to providing up to 40 percent of the extra costs imposed on states by IDEA, 20 U.S.C. § 1411(a)(2)(B), in reality appropriations have fallen far short of that expectation. In 2002, for example, the federal budget covered only 18 percent of the additional costs of providing special education.[6] The average per-pupil expenditure for a special education student is nearly twice that of other students, and in 2000 special education accounted for nearly 22 percent of nationwide spending on education although only 11 percent of students receive special education services. *Id.* at ¶ 3. For children with autism, the costs are even higher. A report by the Center for Special Education Finance estimates that school systems spend on average $18,790 per student to provide instructional and related services to a student with autism. Jay G. Chambers et al., Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability* 5 (Jun. 2003). Certain methods of therapy, such as the ABA method favored by the parents in this case,[7] can cost as much as $40,000 per child per year. Kristen Gerencher, *Parents Urged to Take Role in Early Treatment of Autism,* Thompson Fin. News, Feb. 24, 2005.

Educational experts debate which methods are most effective—*i.e.*, meaningful—for educating children who are autistic. *See LT* v. *Warwick Sch. Comm.*, 361 F.3d 80, 83

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[6] National Association of State Boards of Education, *Special Education Funding*, 10 NASBE Policy Update 12, ¶ 2.

[7] The Deals advocated for a program developed by the Center for Autism and Related Disorders (CARD). The ALJ found that "this program is patterned after a methodology for treating autistic children developed by Dr. Ivan Lovaas." Pet. App. 3a. The CARD program "consists of one-on-one applied behavioral analysis ("ABA") that relies heavily on extremely structured teaching and comprehensive data collection and analysis." *Id.*

(1st Cir. 2004) ("Autism is very difficult for parents, as well as teachers, to handle, and there are divergent theories as to the best treatment."); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000) ("autism experts have a variety of opinions about which type of program is best"); *Adams* v. *Oregon*, 195 F.3d 1141, 1149-1150 (9th Cir. 1999) ("there are many available programs which effectively help develop autistic children"); Pet. App. 58a (expert testimony in district court below that "there is no scientific consensus that any one method of treating autism is any better than another"). As recently amended, IDEA requires that an IEP be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). But the peer-reviewed literature reflects a lively debate concerning the educational benefits of both the ABA Lovaas-style program preferred by the parents in this case, and the TEACCH method on which the school district's program was largely based. Pet. App. 6a-7a & n.5.[8]

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[8] The research pertaining to the TEACCH method is summarized in Gary B. Mesibov, *Formal and Informal Measures on the Effectiveness of the TEACCH Programme*, 1 Autism 25 (1997) and, more recently, in Gary B. Mesibov, et al., The TEACCH Approach to Autism Spectrum Disorders (Kluwer Academic/Plenum Publishers 2005). For benefits of the Lovaas method, see Oscar I. Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. of Consulting and Clinical Psychol. 3 (1987); Oscar I. Lovaas & Tristran Smith, *A Comprehensive Behavioral Theory of Autistic Children: Paradigm for Research and Treatment*, 20 J. of Behav. Therapy and Experimental Psychiatry 17 (1989); John J. McEachin, et al., *Long-term Outcome for Children with Autism who Received Early Intensive Behavioral Treatment*, 97 Am. J. on Mental Retardation 359 (1993). The underlying approach for both methods relies on the same general philosophy: treatment is delivered for many hours per day and in several of the child's environments. *See* Laura Schreibman, *Intensive Behavioral/Psychoeducational Treatments for Autism: Research Needs and Future Directions*, 30 J. of Autism and Developmental Disorders 373, 374 (2000); Committtee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, Educating Children with Autism 140-72 (2001).

In the face of these debates in the medical community and among education researchers, school district personnel across the country are every day developing and implementing IEPs to provide FAPE to students with autism. In doing so, they are applying their best educational judgment, based on constantly evolving educational and medical opinions and in the face of competing research and limited funds, and making individualized determinations about what treatment is most appropriate for each disabled child. The standard of review applied by federal courts in determining whether those IEPs are reasonably designed to provide FAPE can make a concrete difference in ultimately determining whether states and school educators are permitted to make the necessary educational decisions, or whether those decisions instead will be made by reviewing courts.

For example, in *LT* v. *Warwick School Committee*, 361 F.3d 80 (1st Cir. 2004), the First Circuit, using the "some educational benefit" standard, held that an IEP developed for an autistic child that was centered on the TEACCH method provided FAPE, rejecting the parents' contention that the child could only benefit from a Lovaas-style program. The Sixth Circuit reviewing the same IEP, based on the decision below, would likely find that the IEP failed to meet the "meaningful benefit" standard. The direct conflict that has developed among the courts of appeals—and that was deepened by the decision below—concerning whether FAPE should be evaluated based on a "some benefit" or a "meaningful benefit" standard is an important issue that requires this Court's review to create a uniform standard.

II. THE COURT OF APPEALS' PREDETERMINATION RULING RISKS DISCOURAGING SCHOOL DISTRICT PERSONNEL FROM THOROUGH PREPARATION PRIOR TO IEP TEAM MEETINGS

The court below also held that the school district had violated the procedural provisions of IDEA by "predetermining" not to provide ABA-style services to Zachary Deal, which "deprived Zachary's parents of

meaningful participation in the IEP process." Pet. App. 24a-25a. This ruling on "predetermination" threatens to discourage school district personnel from engaging in the thorough preparation and internal collaboration that promotes development of a well-considered draft IEP so that an IEP team meeting can be effective. The predetermination decision below is also of concern because it would allow parents to dictate the contents of an IEP simply by insisting that one—and only one—educational program was beneficial for their child.

Creating an IEP for each student with a disability is an important undertaking that requires substantial preparation and analysis by the school district. The IEP team is composed of at least a special education teacher, a regular education teacher, a school district official, and the parents. 20 U.S.C. § 1414(d)(1)(B). These team members have the often difficult task of developing a plan that includes measurable annual goals for the child and identifies the services that will help the child advance toward those goals. *Id.* § 1414(d)(1)(A)(i); *see also Rowley*, 458 U.S. at 182. In developing the plan, the IEP team must consider many factors, such as the results from the child's evaluation and the child's academic and developmental needs. *Id.* § 1414(d)(3).

Because each IEP is individualized to the student's needs, IEP team members must come to the table prepared to discuss the advantages and disadvantages of various placements and services for that child. Considering that the services that the IEP team members agree upon must be based on "peer-reviewed research to the extent practicable," *id.* § 1414(d)(1)(A)(i), it makes sense for the team members to have an understanding of the effectiveness of those various services and to what extent those services would benefit the child. *See* 30 CFR Pt. 300, App.A, No. 32 (2000) ("Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content."). A less diligent or thorough approach would hamper the development of the IEP, create an inefficient administrative process, and increase the time and costs of

implementing IDEA. *See N.L. v. Knox County Schools,* 315 F.3d 688, 693 n.3 (6th Cir. 2003) ("[W]ithout some organization and evaluation prior to the IEP meeting, it is unclear how an IEP Team could make reasonable or informed decisions."); *see also Hanson* v. *Smith,* 212 F. Supp. 2d 474, 486 (D. Md. 2002) ("while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement").

The dedication and commitment of local educational officials in working with parents to determine and implement IEPs for disabled children are manifest in this case. The district court found that during the two year period from 1997 into 1999, Hamilton County Department of Education (HCDE) teachers and administrators spent approximately 500 staff hours meeting with the Deals on a dozen or so occasions. Pet. App. 52a. The IEP developed by HCDE personnel for Zachary Deal for 1998-99 (when Zachary was four years old) spanned 95 pages and provided for, among other things, 35 hours per week of special education instruction, along with physical therapy and speech therapy. Pet. App. 3a-4a, 51a-52a.

If the decision below on predetermination were allowed to stand, however, school district personnel may be discouraged from the careful and thorough preparation that is necessary for a productive IEP meeting. This preparation requires application of the collective educational expertise and judgment of school district officials to the particular circumstances of the child. If school district officials are concerned that by doing this hard work and developing their collective judgment prior to an IEP meeting, they risk a procedural violation of IDEA, school district officials may be tempted to take the counterproductive position of coming to the IEP meeting "with a blank mind," *Doyle* v. *Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd,* 39 F.3d 1176 (4th Cir. 1994), in order to insulate themselves from a finding of predetermination.

At base, the predetermination decision is just another means of expressing the disagreement of the Sixth Circuit with the school district's determination of the educational methodology that should be employed to serve Zachary. According to the Sixth Circuit, the school district had "predetermined" Zachary's placement because its concerns about the efficacy of the ABA Lovaas-style methodology favored by Zachary's parents led it to a decision—using its best educational judgment—that the eclectic program it developed would provide Zachary with FAPE. Pet. App. 22a. This is nothing more than the court's disagreement with the school district's substantive educational policy judgment about which educational program was "meaningful," in the guise of a procedural violation of the Act.

The Sixth Circuit faulted the school district for predetermining Zachary's placement by considering the cost of the services requested by his parents. Pet. App. 39a. But, contrary to the implication of the court below, in developing an IEP, it is appropriate for school district officials to consider the cost of the services that may be provided, as long as the IEP provides FAPE. In IDEA, "Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions." *Barnett* v. *Fairfax County Sch. Bd.*, 927, F.2d 146, 154 (4th Cir. 1991). This Court has repeatedly concluded that cost may be taken into account in applying IDEA. *See Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999) ("the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA") (citation omitted); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 892 (1984). Indeed, school districts ultimately are responsible for marshalling their limited resources so as to maximize educational opportunities for *all* the children in their care, including those requiring special education services.

The Sixth Circuit's predetermination ruling also will invite litigation by encouraging parents to take hard-line positions that one and only one educational program is appropriate, or "meaningful" for their child, because if the school district rejects that approach—and the parents offer no other approach—the school district will be found to have committed a violation of IDEA. That is what happened here. The school district developed a draft IEP designed to offer a program deemed "eclectic" by the very nature of its inclusion of several different educational methods for autistic students. Pet. App. 7a & n.5. Zachary's parents, by contrast, insisted that the *only* service that would benefit Zachary was an ABA-style program in their home. Pet. App. 26a-27a. Thus by insisting on only one educational method, under the predetermination decision by the Sixth Circuit below, parents could foment a substantive IEP violation if the school district refuses to consider the program preferred by the parents—no matter how untested that program may be. *See generally Erickson* v. *Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121 (10th Cir. 1999) (parents requesting horseback riding (hippotherapy) as related services in an IEP).

III. THE MEANINGFUL BENEFIT STANDARD AND PREDETERMINATION STANDARD ADOPTED BY THE COURT OF APPEALS CONTRAVENE PRINCIPLES OF FEDERALISM

The Sixth Circuit's "meaningful benefit" standard and predetermination ruling contravene the important federalism principles on which IDEA rests. IDEA is Spending Clause legislation, conditioning the receipt of federal funds on the state accepting the requirements of the Act. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26; *see also Cedar Rapids*, 526 U.S. at 83-84 (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Because Spending Clause programs are in the nature of a "contract," "'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Barnes* v.

Gorman, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). It cannot be said that Congress unambiguously imposed the "meaningful benefit" standard on the states. To the contrary, this Court in *Rowley* interpreted IDEA's FAPE guarantee only to require "some educational benefit." And Congress—which is presumed to be aware of this Court's decisions—has reauthorized IDEA against that backdrop.

The decision below undermines the federalism principles that undergird IDEA. The Sixth Circuit noted that the "implications" of its rationale for adopting that standard "might be that, where self-sufficiency is a realistic goal for a child, a program that *maximizes* the possibility of self-sufficiency could be required." Pet. App. 38a n.17 (emphasis added). As this Court held in *Rowley*, however, IDEA cannot require a "potential-maximizing education." 458 U.S. at 197 n.21. And *Rowley* similarly held that self-sufficiency could not be the substantive standard for determining FAPE. *Id.* at 201 n.23. In addition to being wrong, the court of appeals' observation that in its view the law may require FAPE to maximize the possibility of self-sufficiency would have stunning practical and financial consequences for *amici's* members. These consequences would greatly expand the obligations that States *knowingly* assumed when they accepted federal financial assistance under IDEA. *See Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it").

As this Court explained in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208. But that is precisely the effect of the "meaningful benefit" standard and the predetermination ruling below. Rather than allowing state and local educational officials to determine the appropriate educational methods for providing educational benefits to students with disabilities subject to certain objective federal standards,

these rulings invite federal courts to second-guess the decisions of local educational officials concerning the proper educational methodology for a particular child by creating a subjective standard for reviewing IEPs. Furthermore, they invite federal courts to determine that a school district has violated the procedural requirements of the Act simply because it disagrees with the educational method espoused by the parents, as long as the parents espouse only one method and fail to engage the school district on the terms of the method suggested by the school district.

Federalism concerns are particularly strong in the field of education—an area that traditionally has been reserved to the judgments of state and local administrators. *See United States* v. *Lopez*, 514 U.S. 549, 580-81 (1995) ("[I]t is well established that education is a traditional concern of the States."); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decsionmaking, and allows innovation so that school programs can fit local needs.").

This Court cautioned in *Rowley* that "[i]n assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. The Court held that the district court had failed to heed that caution where, when presented with expert "evidence as to the best method for educating the deaf, a question long debated among scholars," it chose the method espoused by the parents' experts rather than by the school district. *Id.* at n.29. The same result follows here. There are competing theories as to the best method for educating students with autism, and there was competing evidence as to the method that would benefit Zachary Deal. This Court should grant review to adopt a uniform national standard that accords appropriate deference to the decisions of states and local educational officials in making these important educational decisions on a case-by-case basis.

Finally, it is important to recognize that consistent with these principles of federalism, IDEA leaves states free to

adopt a higher burden for establishing FAPE under state law, including a "meaningful education benefit" if states so desire. Indeed, IDEA's definition of FAPE explicitly recognized that states may adopt higher standards for FAPE and several states have done so. 20 U.S.C. § 1401(9)(B). Michigan and North Carolina, for example, have adopted a higher standard for FAPE than the standard encompassed by IDEA. *See Renner* v. *Board of Educ.*, 185 F.3d 635, 645 (6th Cir. 1999); *Cone* v. *Randolph County Schools*, 302 F. Supp. 2d 500, 509-510 (M.D.N.C. 2004), *aff'd*, 103 Fed. Appx. 731 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1077 (2005) (citing *Harrell* v. *Wilson County Sch.*, 293 S.E.2d 687, 690 (N.C. Ct. App. 1982)); *Burke County Bd. of Educ.* v. *Denton*, 895 F.2d 973, 983 (4th Cir. 1990). The Sixth Circuit below erred, however, in unilaterally imposing its own, heightened federal FAPE and predetermination standard on state and local education agencies within that circuit.[9]

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[9] In *Schaffer* v. *Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698; to be argued October 5, 2005), this Court has granted certiorari to decide whether parents or school districts bear the burden of proof in an administrative hearing initiated by the parents challenging a child's IEP. Because the Court's decision in *Schaffer* may be instructive as to the federalism issues under IDEA raised in this case, it may be appropriate for the Court to hold the current petition pending resolution of *Schaffer*.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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HAMILTON COUNTY
DEPARTMENT OF EDUCATION,

Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of Zachary Deal,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding, based on a voluminous factual record and extensive findings by Tennessee, that Petitioner violated Respondents' statutory right to meaningfully participate in the development of their son's individual education plan by, among other things, predetermining the limits of that plan before meeting with Respondents, pursuant to Petitioner's policy, and then curtailing Respondents' ability even to ask questions of school officials.

II. Whether the court of appeals correctly remanded this case to the district court to determine whether Petitioner provided Zachary Deal, substantively, with a free appropriate public education under the Individuals with Disabilities Education Act in light of Zachary's individual needs and capabilities, including Zachary's capacity for progressing under the available educational services, and his ability to be educated in a mainstream educational setting with non-disabled peers.

PARTIES TO THE PROCEEDING

Petitioner is the Hamilton County, Tennessee, Department of Education.

Respondents are Maureen and Phillip Deal, for and on behalf of their son, Zachary Deal.

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BRIEF IN OPPOSITION

Respondents Maureen and Phillip Deal (the "Deals"), as parents of Zachary Deal, respectfully request that the Court deny the petition for writ of certiorari filed by Petitioner Hamilton County Department of Education.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-42a, is reported at 392 F.3d 840 (6th Cir. 2004). The court of appeals denied rehearing *en banc*, Pet. App. 115a. That decision is unreported.

The opinion of the district court, Pet. App. 43a-62a, is reported at 259 F. Supp. 2d 687 (E.D. Tenn. 2003). The August 20, 2001 opinion and order of the Tennessee State Department of Education, Pet. App. 63a-114a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2004, and rehearing was denied on April 1, 2005. The petition for a writ of certiorari in No. 05-55 was docketed on July 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The Individuals With Disabilities Education Act ("IDEA") requires Petitioner to provide Zachary Deal, a child with autism, a free appropriate public education

("FAPE"). 20 U.S.C. § 1412(1). In this case, after thorough consideration of the district court's views, the detailed findings of an administrative law judge from Tennessee State's Department of Education ("Tennessee"), and a voluminous factual record, the court of appeals held that Petitioner failed to provide Zachary with a FAPE because Petitioner violated the statutorily mandated procedures for developing his individual education plan ("IEP"). 20 U.S.C. § 1415 *et seq.*

First, the court of appeals held that Petitioner violated IDEA by failing to provide the participation of a regular education teacher in the preparation of Zachary's IEP. Pet. App. 29a-32a. This holding alone required reversal of the district court and a remand for assessment of the Deals' claim for reimbursement as provided by the statute. Yet Petitioner does not challenge this ruling here.

Second, the court of appeals held that Petitioner violated IDEA by depriving the Deals of their right to meaningfully participate in the development of their son's IEP. Pet. App. 21a-29a. On the particular facts of this case, the Sixth Circuit concluded that Petitioner had predetermined Zachary's IEP before meeting with the Deals and, in a host of ways, precluded the Deals from having their dissenting views meaningfully considered. Pet. App. 26a-27a. In seeking review of this ruling, Petitioner badly misstates the holding of the court of appeals. The Sixth Circuit in no way held that local educational authorities must "bow to the unilateral dictates of parents" regarding a child's IEP. Pet. App. 19. To the contrary, the Sixth Circuit held only that Petitioner had "pre-selected" Zachary's IEP "regardless of Zachary's demonstrated individual needs" and that Petitioner was not open to modifying this pre-selected plan "no matter how strong the evidence

presented by the Deals." Pet. App. 21a, 27a. There is no cause for this Court to review this fact-bound assessment.

In addition, the court of appeals considered whether Petitioner also violated IDEA's substantive requirements. In this regard, the Sixth Circuit held that the district court failed to apply the proper standard in examining whether Petitioner's proposed IEP for Zachary substantively violated IDEA's requirement that he receive an individually tailored education sufficient to meet his specific needs. After meticulously parsing both the statute and this Court's decision in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), the court concluded that, while school districts are "clearly" not required to "maximize each child's potential" achievement, Pet. App. 33a-34a, their choice between educational plans must take some account of the individual potential of each child and the outcomes that might be achieved depending on what program is adopted. Pet. App. 34a. In Zachary's case, in particular, the court of appeals concluded that the district court had not taken sufficient account of Tennessee's findings with respect to Zachary's educational potential and remanded the case so that the district court could determine whether Petitioner's IEP for Zachary provided him with a "meaningful benefit" given his unusually high educational potential. Pet. App. 40a.

According to Petitioner, the Sixth Circuit's view that IDEA requires school districts to consider individual potential in designing IEPs and provide a "meaningful benefit" to individuals depending on circumstance, conflicts with the allegedly less stringent "some benefit" standard that other circuits have adopted. The purported circuit split, however, rests on semantics rather than substance. The "meaningful benefit" standard under the Sixth Circuit's

decision requires that educational agencies consider a child's unique needs and characteristics – in particular, the child's capacity to progress under a given educational program – in considering what constitutes a FAPE. This holding is entirely consistent with the holdings of other courts of appeals – including those that use the "some benefit" language – and with this Court's decision in *Rowley*, which recognized that there is no single standard that applies to the infinite range of needs, characteristics, and capacities of disabled children. Moreover, even if there is some minor divergence among the courts of appeals, this case presents a poor vehicle for this Court's consideration of the issue. The Sixth Circuit remanded to the district court for a determination of whether Petitioner committed a substantive violation of IDEA. If no such violation is ultimately found, Petitioner's challenge to the Sixth Circuit's "meaningful benefit" standard will be moot. On the other hand, if a violation is found, Petitioner will have another opportunity to raise the issue at that time. Accordingly, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Zachary Deal's Disability And Petitioner's IEPs

Zachary has been diagnosed with autism and verbal dyspraxia. Pet. App. 63a, 72a, 85a. In 1997, after being diagnosed with autism at age two-and-a-half, Zachary was referred to the Tennessee Early Intervention System. Pet. App. 73a-74a. Zachary's intelligence could not be tested at this point because he had not reached the age of two in development. Pet. App. 73a. Zachary was subsequently referred to Petitioner to develop an IEP. Pet. App. 74a. Zachary's first IEP meeting was held on July 30,

1997. *Id.* No regular education teacher attended this meeting. Pet. App. 75a. Zachary's first IEP placed him at the Ooltewah Elementary School in a special education class with other disabled children, and provided for ninety minutes of speech therapy each week. Pet. App. 75a-76a. In October, the IEP was revised to include 45 minutes of speech therapy a day. Pet. App. 75a.

The Deals learned about Lovaas-style applied behavioral analysis intervention ("ABA") in August of 1997, shortly after Zachary began attending Ooltewah. Pet. App. 64a, 75a. ABA is a systematic approach to teaching young autistic children based on operant conditioning. It was developed at the Psychology Department of the University of California at Los Angeles in the 1980s, and has been subject to the most reliable studies and testing of any therapy for autism. Pet. App. 64a-65a, 78a-81a, 85a, 89a. After studying ABA, the Deals secured ABA services for Zachary at their own expense, selecting a program administered by the Center for Autism and Related Disorders. Pet. App. 64a, 85a, 91a.

Petitioner held several IEP meetings with the Deals in the Spring of 1998, Pet. App. 76a-77a. During these meetings, Petitioner recommended that Zachary cut back to part-time attendance at Ooltewah so he could devote more time to ABA therapy. Pet. App. 77a. Petitioner was impressed with the progress Zachary was making as a result of his ABA program. Pet. App. 78a, 85a. Indeed, Zachary tested at 93 on an IQ test administered in April 1998. Pet. App. 82a. Before the Deals requested funding for Zachary's ABA program from Petitioner, it had flagged Zachary's education program as a "sensitive case" under Petitioner's policy of rejecting any and all requests for ABA for young autistic children. Pet.

App. 86a. At an IEP meeting held on May 11, 1998, the Deals presented the results of Zachary's ABA program and requested that Petitioner incorporate ABA into Zachary's IEP. Pet. App. 77a-78a, 86a. Petitioner rejected the Deals' request, reasoning that it could not give the same ABA services to everyone, Pet. App. 77a, and citing cost as a significant factor in its decision. Pet. App. 86a. Petitioner also informed the Deals that it could not provide ABA for Zachary because "the powers that be" were not implementing ABA programs and instead recommended Petitioner's own program for autistic children. Pet. App. 77a-78a, 86a.

Selecting the wrong methodology for an autistic child can mean the difference between an independent adult life and a lifetime of dependency and support. Pet. App. 107a. Petitioner's program is not based on any single methodology, but is cobbled together from various components of other methodologies for treating autistic children. Pet. App. 82a, 101a. The largest component of Petitioner's "eclectic" program is derived from a system called "TEACCH," a cradle-to-grave system based on the assumption that the core clinical problems of autism are lifelong. Pet. App. 81a-82a, 101a. Petitioner has never acceded to the Deals' requests for data on the efficacy of Petitioner's program, Pet. App. 3a, 78a, 98a-99a, 101a, 107a, although the Deals have never refused a request for information from Petitioner about Zachary or his ABA program. Pet. App. 88a. Petitioner has little or no expertise in ABA, Pet. App. 89a, and has low expectations for autistic children, believing that it is unrealistic to try to help Zachary develop a relatively normal life of independence. Pet. App. 89a. In fact, Petitioner has never provided ABA services to any autistic child, Pet. App. 78a, and

Petitioner's personnel even have a manual titled "How to Avoid Parents' Demands for Lovaas." Pet. App. 23a-24a n.12. Petitioner's personnel also demonstrated "an appalling lack of interest" in exploring improved and proven methodologies such as ABA. Pet. App. 101a, n.4. As a result, Petitioner based Zachary's IEP on a system designed for autistic children incapable of making academic progress or IQ gains like those Zachary had already demonstrated under ABA.

Although in May 1998 Petitioner refused to make ABA services part of Zachary's IEP, Pet. App. 78a, Extended School Year Services were made part of the IEP. Pet. App. 77a. The Deals continued to privately fund Zachary's ABA program and speech therapy. When Petitioner reconvened the IEP meeting in October of 1998, the Deals again asked that Petitioner include ABA services. But Petitioner again refused. The Deals proposed approximately 600 goals for Zachary's IEP; Petitioner countered with 78 goals. Pet. App. 83a-84a. Eventually, Zachary's 1998 IEP included 137 goals. Zachary achieved 99 of them, along with 130 goals that Petitioner refused to include in his IEP. *Id.* No regular education teacher, who taught Zachery, attended the October 15, 1998 IEP meeting. Pet. App. 86a. Petitioner failed to interview any of the ABA providers even though ABA constituted the bulk of Zachary's educational program at the time. Pet. App. 84a.

Nor did a regular education teacher participate in the February 1999 meeting, and Petitioner informed the Deals that they could not ask questions at the March 3, 1999 meeting. Pet. App. 83a. An IEP meeting was held again in the Spring of 1999 to develop Zachary's IEP for the summer. *Id.* Although his 1998 IEP had included summer services, and even though Zachary was exhibiting emerging speech

and language skills, Petitioner denied the Deals' request for summer services in 1999. Pet. App. 83a, 90a, 104a, 105a. Petitioner also failed to provide Zachary with speech and language services until over four months into the school year and only provided a fraction of the prescribed occupational therapy even though Zachary's IEP included these services. Pet. App. 112a. Although Petitioner refused to provide any services during the summer of 1999, the Deals continued to provide ABA, speech therapy and occupational therapy during that time period. *Id.*

Zachary was tested in June of 1999. As a result of the ABA program, he scored twelve points higher on his IQ test than the previous year and had made "tremendous progress" in his interpersonal and reasoning skills. Pet. App. 84a. In fact, Zachary had progressed to the point where he was ready to be educated in a regular classroom with his typically-developing peers. *Id.* But when an IEP meeting was held on August 20, 1999, no regular education teacher was present. Pet. App. 90a. At the next meeting on August 25, the regular education teacher left the meeting before Zachary's goals and objectives were developed and before placement was decided. Pet. App. 87a. The Deals asked Petitioner to place Zachary in regular education classes to the maximum extent possible, but Petitioner proposed that Zachary attend regular education classes for fifteen minutes, three times a week. Pet. App. 110a. The proposed IEP would have placed Zachary for a year in a classroom where every single child was disabled. Pet. App. 111a. The Deals rejected this proposed IEP and withdrew Zachary from the public education system and enrolled him at the Primrose School, a private school, where he attended regular education classes with an aide. Pet. App. 88a, 111a. The Deals

provided Zachary with ABA, speech therapy and occupational therapy while he attended Primrose. Pet. App. 66a, 88a. Notably, Zachary did quite well at Primrose, where he fit in well with his peers, adopted their normal behaviors, acquired new skills and was, academically, one of the better students in his class. Pet. App. 87a, 88a. Notably, Zachary acquired new skills in proportion to the number of ABA hours received. Pet. App. 88a. Indeed, in the summer of 2000, Zachary's IQ tested another 26 points higher than his last score. Pet. App. 90a.

Notwithstanding Zachary's gains, Petitioner again refused to provide Zachary with extended school year services for the summer of 2000, and the Deals were forced to continue providing Zachary with an ABA program, speech therapy and occupational therapy. Pet. App. 105a. In August 2000, Petitioner developed an IEP for Zachary that provided placement at a public school, Westview Elementary, in regular education classes. Pet. App. 91a. The Deals again requested that the IEP include ABA services, and again Petitioner denied the request. *Id.* Petitioner even refused the Deals' offer to help train Petitioner's personnel on Zachary's ABA programs and protocols. Pet. App. 92a.

B. Tennessee's Decision

Zachary's parents sought relief under IDEA and Tennessee held a hearing on the Deals' claims, presided over by an administrative law judge with special training in physical and mental disabilities and special education programming. *See* TENN. COMP. R. & REGS. 0520-1-9-.14(10)(c)(4) (2005). The hearing lasted twenty-seven days and involved testimony from twenty fact and expert witnesses, tens of thousands of

pages of documentary evidence and exhibits, several videotapes of Zachary, and the administrative law judge's personal observation and evaluation of Zachary in five different settings at Petitioner's request. Pet. App. 67a. At the completion of the proceedings, Tennessee concluded that Petitioner had denied Zachary a FAPE and that the Deals were entitled to reimbursement for some of the expenses they had incurred in providing appropriate educational services for Zachary. Pet. App. 106a-14a.

Specifically, Tennessee found, *inter alia*, that (1) Petitioner prevented the Deals from effectively participating in the development of Zachary's IEP by adopting a blanket policy that no autistic child in Hamilton County would be provided with an ABA program, no matter how effective and appropriate that program might be for the child, Pet. App. 78a, 86a, 90a, 98a, 99a, 102a, 108a; (2) Petitioner failed to have regular education teachers present, as required by IDEA, at critical IEP meetings, Pet. App. 83a, 86a-87a, 90a, 99a; (3) Petitioner failed to make ABA services a part of Zachary's IEP, despite his remarkable progress with the ABA program that the Deals provided at their own expense, Pet. App. 70a, 98a, 101a, 102a, 103a, 104a, 108a; (4) Petitioner failed to provide Zachary a FAPE by refusing to provide educational and related services during the summer, even though Petitioner's acknowledged that Zachary would regress without those services, Pet. App. 104a-6a; (5) Petitioner failed to educate Zachary in regular education classrooms to the maximum and appropriate extent possible, Pet. App. 109a-11a; (6) Petitioner frequently failed to deliver speech and occupational services that were made part of Zachary's IEPs. Pet. App. 112a-3a; (7) Petitioner failed to provide a proven or even describable methodology for educating autistic children, Pet. App. 101a; and (8) Petitioner failed

to provide an objective, measurable, and sufficient number of goals for the IEP. Pet. App. 109a.

Tennessee also explicitly found that Zachary would not make progress under Petitioner's proposed IEPs, and that they would, in fact, *retard* his growth. Pet. App. 7a n.6, 103a-4a. Tennessee determined that Zachary's greatest gains occurred during the periods when he received no services from the Petitioner. Pet. App. 92a. Indeed, *Petitioner's own expert witness testified* that ABA services needed to be a part of Zachary's program, Pet. App. 68a, 93a-94a, and that Petitioner's program does not address some of the primary deficits of children with autism. Pet. App. 95a.

C. District Court Proceedings

The Deals and Petitioner each sought review of portions of Tennessee's decision. Petitioner introduced testimony from six new witnesses and twenty-four new exhibits. Pet. App. 9a. Riding roughshod over explicit factual findings and credibility determinations, Pet. App. 61a-62a, the district court concluded that Tennessee should have deferred to the IEPs developed by Petitioner, Pet. App. 57a-60a, and found that the IEPs would have resulted in adequate progress despite Tennessee's conclusion to the contrary. Pet. App. 60a.

D. Sixth Circuit's Decision

The Sixth Circuit went though the voluminous record and held, as Tennessee's factual and legal findings support, that Petitioner procedurally violated IDEA and deprived Zachary of a FAPE by (a) unilaterally "predetermining" Zachary's

educational placement and program prior to Zachary's Individual Education Plan ("IEP") meetings; (b) repeatedly failing to ensure the statutorily mandated attendance of a "regular education teacher" at four of Zachary's IEP meetings; (c) maintaining and implementing an "unofficial policy" that prevented Petitioner from individualizing Zachary's IEP; and (d) depriving Zachary's parents of any "meaningful" involvement and participation in the IEP process. Pet. App. 6a, 24a-25a, 27a-29a, 31a-32a.[1] The Sixth Circuit held that the Deals had carried their burden of demonstrating the foregoing procedural violations, which, in and of themselves, deprived Zachary of a FAPE. Pet. App. 21a-32a.

The Sixth Circuit also remanded to the district court the issue of whether Petitioner committed a substantive violation of IDEA by failing to provide Zachary with an IEP that would have afforded him any meaningful benefit. Pet. App. 33a-40a. In doing so, the Sixth Circuit concluded that IDEA requires that benefits under an IEP need to be tied to the individual abilities of the child so that the IEP has some meaning – *i.e.*, a "meaningful benefit." Pet. App. 40a. According to the Sixth Circuit, it is insufficient to have "some benefit" that has meaning to another child, but none to the child at issue.

The Sixth Circuit – far from permitting the Deals to "dictate unilaterally" Zachary's placement, Pet. 19, – merely concluded that Tennessee's factual findings as to

[1] Contrary to Petitioner's position, this Court's grant of certiorari in *Schaffer v. Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698), an appeal dealing with the allocation of burdens of proof, is irrelevant to this appeal. Here, the Sixth Circuit placed the burden of proof on the *parents*, not Petitioner. Pet. App. 18a.

the appropriate education for Zachary were entitled to greater deference than that accorded by the district court:

> What seems to have been overlooked by the district court in this case is that the ALJ is a representative of the state presumed to have both the educational expertise and the ability to resolve questions of educational methodology that the federal courts do not have. . . . The district court does not appear to have accorded due deference to the ALJ's findings especially in areas touching upon the ALJ's presumed educational expertise.

Pet. App. 39a-40a; *see also* TENN. COMP. R. & REGS. 0520-1-9-.14(10)(c)(4) (2005). The Sixth Circuit did not determine the level of benefits that are appropriate for Zachary, but remanded the issue to the district court for a careful weighing of the equities, giving due deference to Tennessee's findings, and taking into consideration Zachary's individual abilities. Pet. App. 40a.

Petitioner filed for *en banc* review, but not a single judge sitting on the Sixth Circuit voted in favor of granting the application. Pet. App. 115a.

THE PETITION SHOULD BE DENIED

I. The Highly Fact-Specific Predetermination Holding Resulted From The Application Of Uniformly-Accepted Legal Standards To This Complex Factual Record

The Sixth Circuit held that Petitioner impermissibly predetermined decisions relating to the educational support it would provide to Zachary. In reaching this

conclusion, the Sixth Circuit cited to no fewer than fifteen specific factual findings made by Tennessee. On that basis, the court stated:

> The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program. This conclusion is bolstered by evidence that the School System steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results. Indeed, School System personnel openly admired and were impressed with Zachary's performance (presumably attained though the ABA program), until the Deals asked the School System to pay for the ABA program. Several comments made by the School System personnel suggested that they would like to provide Zachary with ABA services, *i.e.* they recognized the efficacy of such a program, but that they were prevented from doing so, *i.e.*, by the School System policy. The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

Pet. App. 26a-27a.

Petitioner incorrectly contends that the Sixth Circuit "deemed it improper for Petitioner to consider the expense of Lovaas-style ABA." Pet. 21. Actually, the Sixth Circuit specifically recognized that "[a] school district unquestionably may consider cost in determining appropriate services for a child." Pet. App. 28a (citation omitted). What a school district may not do, however, is decide prior to an

IEP meeting that it would only provide one type of therapy to an autistic student merely because it made a prior investment, no matter what the individual child's needs and capabilities. *Id.* The undisputed record is that Petitioner decided prior to the IEP meeting that it would use a variant of TEACCH – a program that may be appropriate for some children, but was inappropriate for Zachary – because it had invested money in that program. *Id.* As emphasized by the Sixth Circuit:

> The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child*. A placement decision may only be considered to have been based on a child's IEP when the child's individual characteristics, including demonstrated responses to particular types of educational programs, are taken into account.

Pet. App. 28a-29a (emphasis in original).[2] While cost can therefore be considered, "[a] school system should not make placement decisions on the basis of financial considerations alone." *Hanson v. Smith*, 212 F. Supp. 2d 474,

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[2] As Tennessee also recognized, IDEA does not require a Cadillac, only a serviceable Chevrolet. Pet. App. 99a-100a. Tennessee stated that IDEA "does, however, require [Petitioner] to make sure whichever vehicle they propose, is fully gassed and capable of arriving at the appropriate destination. The appropriateness of the destination is dependent to a large extent on the child's abilities and potential." *Id.*

482, *citing, Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991).[3] Here, Petitioner made decisions solely based upon cost and, in violation of the statute, failed to come to the IEP meeting with an open mind. *N.L. ex rel. Ms. C. v. Knox County Schs.*, 315 F.3d 688, 694-95 (6th Cir. 2003).

The court of appeals ruling in this regard is correct and, as especially relevant here, raises no issue of general importance. Rather, it simply applies well-settled law to the facts of this case as meticulously developed in proceedings before Tennessee. Accordingly, the court of appeals predetermination ruling presents no occasion for review by this Court. *See* Sup. Ct. R. 10.

II. This Case Does Not Present A Genuine Circuit Split

The primary reason Petitioner advances for granting certiorari is the alleged existence of a "clear circuit split," Pet. 11, regarding the meaning of a "free appropriate public education" under IDEA. According to the petition, a majority of circuits "squarely reject," Pet. 12, a "stringent," Pet. 17, "meaningful benefit" standard in favor of a "modest," Pet. 12, "some benefit" test. Pet. 11-18. There is no such split. All circuits agree on the basic principles that guide the analysis of whether a disabled child has been provided a FAPE. All circuits, agree that states are not required to maximize a disabled child's ability to fulfill his

[3] As for Petitioner's argument that it may withhold ABA therapy from Zachary because "of the expense of providing such therapy on a system-wide basis," Pet. 21, this Court rejected the sole use of cost as the basis for defining the required services under IDEA. *Cedar Rapids Cmty. Sch. Dist. v. Garret ex rel. Charlene*, 526 U.S. 66, 77-78 (1998).

or her full academic potential. All circuits also agree that IDEA requires that the individual child's unique, individual characteristics and capabilities be considered when evaluating whether he or she has received a FAPE.

The cases Petitioner cites do not demonstrate any split. The "split" Petitioner identifies is, at most, a split based on semantics. Many circuits ostensibly identified in the petition as "some benefit" courts cite to "meaningful benefit" cases for the appropriate standard under IDEA. Petitioner has not articulated what distinguishes the "some educational benefit" standard from the "meaningful educational benefit" standard. Petitioner suggests that the "meaningful benefit" standard is more "stringent" and "subjective" than the "some benefit standard," Pet. 17, although it is not clear how this is so.[4] It also suggests that the "meaningful benefit standard" is somehow commensurate with potential-maximization, Pet. 15; but the Sixth Circuit has flatly rejected potential-maximization as a standard.

The Sixth Circuit clearly explained what it meant by a "meaningful benefit:" that a disabled child's individual characteristics – *i.e.*, his or her capacity to respond to the available educational methodologies – is one factor that

[4] Petitioner may believe that the test was applied too stringently in this case, but that does not show that there is a genuine circuit split on the meaning of IDEA. Petitioner cites to the Sixth Circuit's dicta in footnote 17 that a FAPE may require self-sufficiency, where self-sufficiency is a realistic goal. Pet. 15. This sentiment is perfectly consistent with *Rowley*, which rejected self-sufficiency as a universal goal because it would be unattainable for some disabled children. 458 U.S. 176, 201 n.23 (1982). But even if this dicta applies the benefit standard too heavily, this Court does not grant certiorari to correct dicta. *See* Sup. Ct. R. 10.

must be considered when deciding what a FAPE is for that child. Pet. App. 34a, 38a. The Sixth Circuit's ruling is in harmony with every other circuit that has considered the issue and is consistent with this Court's analysis of IDEA in *Rowley* and with the text and legislative history of IDEA.

A. All Circuits Agree On The Principles Governing The Fact-Specific Inquiry Of What Constitutes A FAPE

This Court noted over twenty years ago that the statutory definition of a FAPE "tends toward the cryptic rather than the comprehensive," *Rowley*, 458 U.S. at 188, but that the statutory text and legislative history of the EHA (IDEA's predecessor) provide sufficient clues to make the requirement "tolerably clear." 458 U.S. at 203. First, Congress was concerned that disabled children be provided meaningful access to public education. 458 U.S. at 191-2, 194 n.18. Second, Congress was concerned with providing an education that would be appropriate for each individual child, rather than enforcing equality of educational opportunity[5] – a standard too high for some children – or equality of educational services – a standard too low for others. 458 U.S. at 198-9. Third, disabled children vary widely in their characteristics and abilities, and respond to different educational services with equal variety. In light of these individual variations, Congress required that the education provided must be specifically tailored to each

[5] The equality-of-opportunity standard required by the district court in *Rowley*, and rejected by this Court, is often referred to as "potential-maximizing" in subsequent cases. *See, e.g., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (citing *Rowley*, 458 U.S. at 197 n.21 & 200-01).

individual disabled child. 458 U.S. at 181, 201-2, 203. Fourth, Congress expressed a strong preference for "mainstreaming" where possible. 458 U.S. at 202-3. Indeed, Congress sought to make educational services available that might enable disabled children to reduce their dependence on society, and perhaps even to find gainful employment and become contributing members of society. *See Rowley*, 458 U.S. at 201 n.23; 20 U.S.C. §§ 1400(a)(5)(E) and (d)(1)(A). Finally, the standards established for judicial actions to review state administrative hearings dictate that courts are to give appropriate deference to state educational policy decisions. 458 U.S. at 206.

In *Rowley*, this Court did not decide what would constitute an appropriate education in a substantive sense. It expressly declined to "establish any *one* test for determining the adequacy of educational benefits conferred upon *all* children covered by the Act." 458 U.S. at 202. *Rowley* found that a disabled hearing impaired child who was participating in regular education classes with her non-disabled peers, where she advanced easily from grade to grade and, in fact, performed at an above-average academic level, was receiving a FAPE. 458 U.S. at 203 n.25.

Thus, what constitutes a FAPE for each disabled child is a case-by-case analysis, highly dependent on the individual characteristics of the child. 458 U.S. at 188-89, 201. The courts of appeals uniformly recognize this principle, and also uniformly recognize the applicability of the principles established in *Rowley*: (1) a FAPE requires

meaningful access to educational services,[6] 458 U.S. at 191-2, 194 n.18; (2) a FAPE does not require that a disabled child be provided educational services that allow the child to maximize his or her academic potential,[7] 458 U.S. at 198; (3) what constitutes a FAPE depends on the unique individual characteristics and abilities of the child,[8]

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[6] *See, e.g., JSK ex rel JK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991); *Butler v. Evans*, 225 F.3d 887, 894 (7th Cir. 2000); *Kings Local Sch. Dist. Bd. of Educ. v. Zelazny*, 325 F.3d 724, 729 (6th Cir. 2003); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1047 (5th Cir. 1989); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998).

[7] *See, e.g., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (IDEA does not require the "absolutely best or 'potential maximizing' education"); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) ("IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense"); *School Bd. of Henrico County v. Z.P. ex rel. R.P.*, 399 F.3d 298 (4th Cir. 2005) ("Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential"); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 379 (2d Cir. 2003) (same).

[8] *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (what constitutes appropriate compensatory education is a fact-specific inquiry); *Walker County Sch. Dist. v. Bennett ex rel. Bennett*, 203 F.3d 1293, 1296 n.10 (11th Cir. 2000); *JSK ex rel. JK v. Henry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) (adequacy is to be determined on a case-by-case basis in light of individual child's needs); *O'Toole ex rel. O'Toole v. Olathe Dist. Sch. Unified Schs. Dist. No. 233*, 144 F.3d 692, 700 n.6 (10th Cir. 1998) (appropriate education under both Kansas law and IDEA provides "educational benefits in the context of [] the individual's particular abilities or capacities"); *Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 998-99 (8th Cir. 2004) ("A specialized course of instruction must be developed for each disabled student, taking into account that child's capabilities"); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (whether mainstreamed education is appropriate is an "individualized, fact specific inquiry"); *MM ex rel. DM*

(Continued on following page)

458 U.S. at 181, 201-3; and (4) a FAPE should enable disabled children to be educated with their non-disabled peers to the extent possible,[9] 458 U.S. at 202-3.

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v. Sch. Dist. of Greenville County, 303 F.3d 523, 537 (4th Cir. 2002) ("whether services beyond the regular school day are essential . . . is necessarily fact and case specific"); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177 (3d Cir. 1998) (explaining that the "system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's 'unique needs.'") (emphasis in original, internal citations omitted); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 338 (2d Cir. 2005) ("IDEA cases [] are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education"); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) (noting that "academic potential is one factor to be considered" when formulating an IEP). *See also Rowley*, 458 U.S. at 201 (concluding that the Act requires "access to specialized instruction and related services which are *individually designed* to provide educational benefits for the handicapped child.") (emphasis added).

[9] *See, e.g., Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (1992), *and reinstated*, 967 F.2d 470 (1992); *Murray ex rel. Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 926 n.9 (10th Cir. 1995) (quoting 20 U.S.C. § 1412(5)(B)); *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 656-57 (9th Cir. 2005) (Gould, J., concurring); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 661 (8th Cir. 2000) (describing mainstreaming as one of the "primary objectives" of the IDEA); *Casey K. ex rel. Norman K. v. St. Anne Cmty. H.S. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005) (noting the statutory preference for mainstreaming); *McLaughlin v. Holt Public Sch. Bd of Educ.*, 320 F.3d 663, 672 (6th Cir. 2003) (noting that "the plain language of the requirement in the Act clearly commands schools to mainstream disabled children as much as possible."); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 681-82 (4th Cir. 2004) (same); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (explaining that the mainstreaming mandate "require[s] that a disabled child be placed in the least restrictive environment. . . ."); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 379 (2d Cir. 2003) (same); *Roland M. v. Concord Sch. Comm.*, 910 F.2d

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B. The Sixth Circuit Applied These Well-Understood General Principles

The Sixth Circuit applied the principles established by this Court to the inherently fact-specific inquiry of what constitutes a FAPE for Zachary. As a result, the Sixth Circuit concluded that the district court had erred by (1) failing to give due weight to Tennessee's factual findings, especially those findings regarding educational policy, Pet. App. 39a-40a; and (2) failing to consider Zachary's unique, individual characteristics and needs – in particular, his capacity to respond to various educational services – when deciding whether Petitioner provided him with a FAPE, Pet. App. 32a-39a. On remand, the Sixth Circuit tasked the district court with evaluating Petitioner's proposed educational services with these considerations in mind. Pet. App. 40a.

The Sixth Circuit's holding that the extent to which a disabled child is capable of benefiting from the available educational methodologies is an appropriate factor to consider when determining whether a school district has provided that child with a FAPE, is perfectly consistent with a principle uniformly recognized by the courts of appeals that the determination of what constitutes a FAPE for a particular child is a case-by-case, fact-specific inquiry that necessarily turns on the child's individual characteristics. Pet. App. 38a. Likewise, the principle applied by the Sixth Circuit in reaching its holding, that IDEA does not require services that maximize the potential of each individual child, is also accepted by all circuits. Pet. App. 20a (quoting *Rowley*, 458 U.S. at 200-01).

983, 992-93 (1st Cir. 1990) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria."). *See also Cedar Rapids*, 526 U.S. at 78.

C. Petitioner's "Circuit Split" Is Based On Semantics Rather Than A Genuine Split In The Law

The cases cited by Petitioner as evidence of the "clear circuit split" actually show the opposite – that there is no circuit split about whether a child's individual characteristics, including the extent to which the child is capable of benefiting from different educational services, is an appropriate factor to consider when determining if Petitioner has provided a FAPE. Moreover, other cases from these "majority" circuits approve of the articulation of standards governing a FAPE as set forth by the "minority" circuits, demonstrating that the courts of appeals do not perceive any meaningful difference between the so-called "some benefit" and "meaningful benefit" standards.

In three of the cases cited as "squarely rejecting" a meaningful benefit standard (from the Fourth, Tenth and Eleventh Circuits), the courts simply reject a "potential maximizing" standard.[10] The courts do not reject a meaningful benefit standard as articulated and applied by the Sixth Circuit; *i.e.*, a standard that requires a non-trivial educational benefit and an evaluation of the child's individual capacity to respond to the available educational

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[10] Pet. 11; *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) (rejecting potential maximization, and finding that the state must provide "meaningful access," with a FAPE that confers "some educational benefit") (citations omitted); *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 700 (10th Cir. 1998) (disagreeing with the O'Tooles' argument that Kansas requires services to "maximize each child's potential"); *JSK ex rel. JK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) (explaining that access must be meaningful, and is meaningful when sufficient to confer *some* benefit, that is, not necessarily a benefit that would achieve the child's maximum potential).

services. Another case cited in the petition as "squarely rejecting" a meaningful benefit standard (Seventh Circuit) explicitly *does not* reject that standard; it simply notes that a meaningful benefit standard may be slightly more stringent than a some benefit standard, but holds that the IEP at issue in that case met both tests. *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 906 n. 3 (7th Cir. 2002). The remaining three cases cited in the petition as "squarely rejecting" a meaningful benefit standard (First, Eighth and D.C. Circuits) do not address the substantive prong of a FAPE inquiry. Two of the three deal with the scope of the remedy that can be awarded to a successful IDEA litigant,[11] while the third deals with the division of responsibility between state and local educational authorities when the local agency lacks the resources to provide a FAPE.[12]

JSK, heavily relied upon by Petitioner, rejects a meaningful benefit standard, but appears to equate a benefit with potential-maximizing. 941 F.2d at 1572-73 (rejecting "meaningful educational benefits" and distinguishing "some or adequate educational benefits" from "maximum improvement"). There, the Eleventh Circuit did not hold that a child's potential to respond to various

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[11] *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (construing equitable jurisdiction to craft appropriate relief); *Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.*, 321 F.3d 9 (1st Cir. 2003) (considering validity of attorneys' fees claim and justiciability of compensatory education claim).

[12] *Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 1002 (8th Cir. 2004) (holding that "Missouri statutes make clear that given the facts of the instant case, the 'buck' stops with the Missouri Department of Elementary and Secondary Education.").

educational services is an impermissible consideration when determining what constitutes a FAPE for that child. On the contrary, it recognized that the inquiry is specifically tailored to the individual characteristics of the child. *Id.* at 1573. Similarly, in *A.B. ex rel. D.B. v. Lawson*, the Fourth Circuit emphasized that *Rowley* required only "*some* educational benefit" as opposed to services necessary to maximize the disabled child's potential. 354 F.3d at 319. There, the primary issue was the district court's failure to give due weight to the factual findings of the state hearing officer, including findings that the child was making academic progress in the public education system. *Id.* at 328 (child's reading level increased two grade levels while in the public school system); *id.* at 321-22 (child made satisfactory grades and received favorable comments from regular education teacher). The state was therefore not required to reimburse A.B.'s parents for the costs of a private school that provided A.B. with an "ideal" environment. *Id.* at 330. Both *A.B.* and *Rowley* are cases wherein a child, who could be excelling if given more resources but who is nonetheless progressing normally in regular education classes, is said to receive a FAPE.

As in *A.B.* and *JSK*, the Tenth Circuit in *O'Toole v. Olathe District Schools Unified School District No. 233* held that an IEP is not inappropriate simply because it does not provide for the best possible program. There, a hearing disabled child was attending both regular and special classes in the public school system. 144 F.3d at 695-96. She apparently began experiencing academic difficulties after her mother died and her father remarried, yet continued to make steady, if uneven, academic progress. *Id.* at 696. After a private evaluation, her parents requested additional educational and related services,

many of which were incorporated into her IEP. *Id.* at 707. Her parents nonetheless enrolled her in a private school and asked for reimbursement from the school district. Reimbursement was denied because, although the private school may have helped maximize her potential, the parents did not demonstrate that the IEP developed by the school district was inappropriate. *Id.* at 708. *O'Toole* did not, however, reject or even address the meaningful benefit standard. In fact, it favorably cited a Second Circuit case, *Walczak v. Florida Union Free School District* (counted as a meaningful benefit circuit by the Petitioner), as well as an earlier Tenth Circuit case, *Johnson ex rel. Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990), that relies on the Third Circuit's *Polk* decision for the standards that govern whether an IEP provides a FAPE. 144 F.3d at 708 (citations omitted).

In *Todd*, the Seventh Circuit neither adopted nor rejected a meaningful benefit standard. The court indicated that a meaningful benefit standard may be "slightly more stringent" than a some benefit standard, but held that the difference between the two standards was immaterial because the individual education plan formulated by the State satisfied both. *Todd*, 299 F.3d at 906 n.3. Indeed, since the difference, if any, between the two standards was immaterial to the court's ruling, it would have been dicta to hold that one or the other was the required test.

The remaining cases cited in the petition as "squarely rejecting" a meaningful benefit standard do not address whether there are two standards, what the differences between the two may be, or which is the appropriate standard. The cases simply quote *Rowley* for the proposition that a FAPE is one that provides "some educational benefit" without addressing the content of that requirement. None of

the cases hold that courts cannot consider the extent of the child's capacity to benefit from an educational plan when determining whether that plan provides a FAPE. *Reid ex rel. Reid* addressed the availability of "compensatory education" as a remedy in an IDEA suit rather than what constitutes an "educational benefit." Following the Third Circuit's decision in *Ridgewood*, a "meaningful benefit" case, the *Reid* court concluded that compensatory education is an appropriate remedy, in part, because an IEP developed for a child injured by the earlier denial of a FAPE will be based on the child's current needs and capacities, rather than on the needs and capacities the child would have had if the earlier damage had not been done. 401 F.3d at 522. Thus, a new IEP will not compensate the child for the harm caused by an earlier, inappropriate IEP.

As in *Reid*, the District of Columbia Circuit does not address, much less "squarely reject" a meaningful benefit standard. Indeed, that court's favorable citation to *Ridgewood* indicates the District of Columbia Circuit has no quarrel with the meaningful benefit standard. In *Missouri Department of Elementary & Secondary Education*, it was uncontested that the school district lacked the resources to provide the disabled child with a FAPE. 358 F.3d 992, 997-8 (8th Cir. 2004). The issues on appeal were whether, under those circumstances, local or state representatives must be part of the child's IEP team; whether local or state representatives were responsible for paying for the child's educational services and whether certain fees and expenses were appropriately awarded to the parents of the disabled child. 358 F.3d at 998.

In *Maine School Administrative District No. 35*, the First Circuit also does not address the standards governing a FAPE, much less "squarely reject" the meaningful

benefit standard. Rather, it dealt primarily with the availability of attorneys' fees and compensatory education when the child had graduated from the public education system during the pendency of the litigation. 321 F.3d at 18-20. The case is apparently cited in the petition because, when giving an overview of IDEA, the opinion notes that IDEA requires states to provide "some educational benefit." *Id.* at 11 (citing *Rowley*).

The Seventh Circuit's decision in *Todd v. Duneland School Corporation* provides an excellent example of Petitioner's faulty circuit split analysis. *Todd* held in dicta that the IEP developed by the school district would be appropriate under either the some benefit test or the "slightly more stringent" meaningful benefit test, without adopting or rejecting either standard. Though Petitioner takes this to mean that the Seventh Circuit is a some benefit circuit, in *Alex R. ex rel. Beth R. v. Forrestville Valley Community United School District # 221*, it cites Fifth Circuit and Second Circuit meaningful benefit cases for the appropriate standard under IDEA. 375 F.3d 603, 615 (7th Cir. 2004) (quoting *Cypress-Fairbanks* and citing *Walczak*); *see also G ex rel. SSgt RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 306 (4th Cir. 2003) ("we must next address the question of whether [the child's IEP] was 'reasonably calculated' to provide [the child] meaningful educational benefit"); *School Bd. of Collier County v. KC*, 285 F.3d 977, 982 (11th Cir. 2002) (finding the Fifth Circuit's test for determining whether an IEP provided a disabled child with educational benefits "as least as stringent as our own"). As none of the circuits dispute IDEA's requirement that disabled children receive a meaningful educational benefit, as defined by the Sixth Circuit, review is not warranted.

III. The Petition Should Be Denied Based Upon The Interlocutory Nature Of The Case

Even if there is some minor divergence among the courts of appeals relating to the standard of benefits, this case presents a poor vehicle for the Court's consideration of the issue because it comes to this Court in an interlocutory posture.

First, because Petitioner does not challenge the court of appeals' holding that Petitioner violated IDEA by failing to provide a regular education teacher's participation in Zachary's IEP meetings and that this procedural violation caused Zachary substantive harm, this case must return to the district court for remedial proceedings regardless of this Court's consideration of the two issues Petitioner raises.[13]

Second, with respect to Petitioner's alleged substantive violation of IDEA, the Sixth Circuit remanded the issue to the district court so that the district court could consider whether Petitioner's proposed IEP would provide

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[13] Despite IDEA's requirement to place disabled children in a mainstream setting whenever possible, *Cedar Rapids*, 526 U.S. at 78, and the related requirement to have a "regular education teacher" attend IEP meetings, 34 C.F.R. § 300.344(a), Petitioner repeatedly failed to ensure the attendance of a regular education teacher at multiple IEP meetings even though placing Zachary into a less-restrictive environment was to be specifically addressed. Pet. App. 30a-31a. In finding that the Petitioner's repeated procedural violations harmed Zachary – and correcting the district court's erroneous conclusion that the regular education teacher missed only two IEP meetings – the Sixth Circuit found that in view of the Deals' objections that the IEP provided insufficient integration, "[t]he absence of the unique perspective that could have been provided by a regular education teacher therefore had a real impact on the decision-making process." Pet. App. 31a-32a.

Zachary with a meaningful educational benefit giving due deference to Tennessee's views. Depending on the outcome of these proceedings, Petitioner's challenge to the Sixth Circuit's "meaningful benefit" standard may become moot.

In short, review in this Court is both unwarranted and, at a minimum, premature. Indeed, because the district court will inevitably have to consider the appropriate relief for the IDEA violation that Petitioner does not challenge, review at this stage by this Court will not economize on judicial resources. Accordingly, the interlocutory nature of Petitioner's appeal presents yet another reason to deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of ZACHARY DEAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

In its petition, Hamilton County Department of Education demonstrated that there is a widespread split among the circuits on an important question of federal law: namely, whether the Individuals with Disabilities Education Act ("IDEA") requires participating States to provide disabled children "some educational benefit" that is measurable and nontrivial, or a "meaningful educational benefit." See Pet. 11-13. Respondents' opposition fails to show otherwise.

Contrary to respondents' claim, the division among the lower courts is not a matter of mere semantics with no practical impact on thousands of school boards and millions of children across the country. Indeed, in explaining why it was adopting the minority "meaningful-benefit" approach, the Sixth Circuit stressed the fundamental differences between these two standards. And, respondents' lengthy discussion of IDEA-related issues on which the lower courts agree is entirely irrelevant. Whatever consensus there is on these issues does not alter the fact that the lower courts disagree on the legal standard school boards must satisfy to show that they are providing a free appropriate public education ("FAPE"). The interlocutory nature of the decision below poses no barrier to review of this fundamentally important issue, or to review of the lower court's closely related, and equally flawed predetermination ruling.

1. This case squarely presents the issue of whether the IDEA's requirement that participating States ensure all disabled children receive a FAPE is satisfied when a school board provides a disabled child with "some educational benefit" that is measurable and nontrivial, as this Court indicated in *Board of Education* v. *Rowley*, 458 U.S. 176, 200 (1982), or whether they must instead satisfy a heightened standard by providing a "meaningful educational benefit." The majority rule of the First, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits requires States to provide

disabled children "some educational benefit." Pet. 11-12. In contrast, the minority rule of the Second, Third, Fifth, Sixth, and Ninth Circuits requires States to satisfy a heightened, amorphous, and inherently subjective meaningful-benefit test. *Id.* at 12-13. The latter standard, which originated in the Third Circuit's faulty reading of *Rowley* and the IDEA's legislative history in *Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), portends grave constitutional and educational consequences. This test not only runs afoul of the Spending Clause's unambiguous obligation requirement, but it also encourages litigation on educational issues, which "will only serve to put further pressure on already scarce educational resources." Brief for *Amici Curiae* National School Boards Association, et al. (*Amici* Br.) 7.

Respondents try to obscure the division over this fundamental question of federal law by arguing that the circuits "uniformly recognize" the contours of a FAPE. Specifically, respondents contend that all circuits understand that a FAPE (1) requires meaningful educational *access*, (2) does not require potential-maximization, (3) should be individually tailored, and (4) requires mainstreaming to the extent possible. Opp. 18-21. This showing is entirely beside the point.

Consensus on these matters simply begs the question presented here of *how much* of an educational benefit must be provided. A court applying either the meaningful-benefit or some-benefit test, for example, must evaluate a child's "unique individual characteristics and abilities," *id.* at 20; without considering a child's cognitive skills and current performance, a court could not determine what educational benefit the child has received, and thus could not determine whether that benefit was meaningful (as the minority of circuits require) or measurable and nontrivial (as the majority of circuits require). The uniform requirement of individual

consideration, therefore, does not demonstrate the absence of a conflict on the substantive standard.

Nor is there any merit to respondents' contention that the different tests the circuits employ reflect nothing more than a "split based on semantics." *Id.* at 17. While respondents claim that the circuits "do not perceive any meaningful difference" between the two substantive standards, *id.* at 23, the Sixth Circuit itself plainly (and correctly) believed these substantive tests were meaningfully different. It categorically rejected the premise that an individualized education program ("IEP") provides FAPE so long as it "is reasonably calculated to enable the child to derive more than *de minimis* educational benefit." Pet. App. 33a. Reasoning that "[n]othing in *Rowley* precludes the setting of a *higher standard* than the provision of 'some' or 'any' educational benefit," *id.* at 35a (emphasis added), it held "an IEP must confer a '*meaningful* educational benefit,'" *id.* at 34a, and remanded for further fact-finding based on this heightened standard, *id.* at 40a. In fact, the Sixth Circuit went out of its way to note that "states providing no more than *some* educational benefit could not possibly hope to attain" what the lower court perceived to be the IDEA's "lofty goals." *Id.* at 38a.

Other courts that have adopted the meaningful-benefit test, *T.R.* v. *Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000), as well as those that have adopted the majority some-benefit rule, *A.B. ex rel. D.B.* v. *Lawson*, 354 F.3d 315, 319, 330 (4th Cir. 2004), *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 & n.3 (7th Cir. 2002), and *JSK ex rel. JK* v. *Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991)), have also recognized that the two tests differ in a legally meaningful way. Like the Sixth Circuit below, for example, the Third Circuit has explained its own precedent as "squarely [holding] that '[t]he provision of merely "more than a trivial educational benefit" does not meet' the meaningful benefit requirement of *Polk*." *T.R.*, 205 F.3d at 577 (second alteration in original) (quoting *Ridgewood Bd. of Educ.* v.

N.E., 172 F.3d 238, 247 (3d Cir. 1999)). By contrast, the Eleventh Circuit has just as squarely rejected the meaningful-benefit test "to the extent [that] 'meaningful' means anything more than 'some' or 'adequate' educational benefit." *JSK*, 941 F.2d at 1572.

Indeed, the decision below illustrates a key distinction between the two tests. The Sixth Circuit explained that, under the meaningful-benefit test, "where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required." Pet. App. 38a n.17. By contrast, under the some-benefit test, a school board would not have to maximize the potential for self-sufficiency, as long as the IEP for the child resulted in measurable, nontrivial educational progress.

Respondents' elaborate efforts to parse and distinguish these cases on their facts, Opp. 23-28, cannot mask this clear conflict. Respondents concede (as they must) that the Eleventh Circuit "rejects a meaningful benefit standard," but they strain to distinguish the law in that circuit by contending that the court "equate[d] a [meaningful] benefit with potential-maximizing." *Id.* at 24. This is not true: the Eleventh Circuit rejected the meaningful-benefit test "to the extent [that] 'meaningful' means *anything more* than 'some' or 'adequate' educational benefit," *JSK*, 941 F.2d at 1572 (emphasis added)—*not* to the extent it "means potential maximizing."

Respondents likewise claim that, in adopting the some-benefit test in *A.B.*, the Fourth Circuit did not reject a meaningful-benefit standard, but only a potential-maximizing standard. Opp. 25. In fact, the Fourth Circuit's standard cannot be reconciled with the standard employed in the decision below. In *A.B.* as here, the disabled child derived a nontrivial benefit, see 354 F.3d at 328 (noting that the child was making academic progress in the public education system), but the parents demanded a program in which he would "perform[] at a much greater academic level than he

ha[d] done in the past." *Id.* at 330 (internal quotation marks omitted). The Fourth Circuit held that "this is *not* what the IDEA requires," and that the standards of a FAPE "are far more modest." *Id.* The district court employed this same standard below, ruling that Zachary had made academic progress under petitioner's methodology, and that petitioner was not required to provide the allegedly superior program respondents prefer. Pet. App. 60a-61a. Under the Fourth Circuit's some-benefit standard, the district court's decision plainly would have been upheld. The Sixth Circuit, however, reversed, not because it questioned whether Zachary had progressed under petitioner's methodology, but because it questioned whether that progress was "meaningful" given the "'remarkable'" results Zachary had achieved under the Lovaas-style program. *Id.* at 7a n.6 (citing ALJ's decision); *id.* at 40a (faulting district court for failing to accord greater deference to ALJ's findings).

Respondents' attempt to dismiss the Seventh Circuit's adoption of the some-benefit test, Opp. 24, 26, 28, fares no better. The Seventh Circuit held that the relevant substantive inquiry is "whether the IEP is reasonably calculated to provide *some* educational benefit to the child." *Todd*, 299 F.3d at 905 (emphasis added). In a footnote, the court explained that "*even if* we were to review the 1998 IEP under the Third Circuit's 'meaningful benefit' test, we would still affirm as the evidence amply satisfies that somewhat more stringent test." *Id.* at 906 n.3 (emphasis added). Contrary to respondents' view, see Opp. 26, this observation does not render the Seventh Circuit's adoption of the some-benefit test dictum. Rather, it is the court's observation that the challenged program would pass muster under a meaningful-benefit test that is dictum. That observation, moreover, makes clear that Seventh Circuit, like the Third, Eleventh and Sixth Circuits, understands the two tests to be different.

Respondents also suggest that the Seventh and Tenth Circuits are meaningful-benefit circuits because they cite

meaningful-benefit cases. Opp. 25-26, 28. In doing so, however, those courts carefully avoided adopting the meaningful-benefit test itself. Thus, the Seventh Circuit explained that an IEP "passes muster provided that it is 'reasonably calculated to enable the child to receive educational benefits' or, in other words, when it is 'likely to produce progress, not regression or trivial educational advancement.'" *Alex R. ex rel. Beth R.* v. *Forrestville Valley Cmty. United Sch. Dist. # 221*, 375 F.3d 603, 615 (7th Cir.) (quoting *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), and citing *Walczak* v. *Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)), *cert. denied*, 125 S. Ct. 628 (2004). Likewise, the Tenth Circuit cited a meaningful-benefit case for the proposition that IEPs need not "'"'enable the child to reach his or her full potential.'"" *O'Toole ex rel. O'Toole* v. *Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998) (quoting *Walczak*, 142 F.3d at 132).

Finally, respondents claim that the D.C. Circuit "simply quote[d] *Rowley* for the proposition that a FAPE is one that provides 'some educational benefit' without addressing the content of that requirement." Opp. 26. But the D.C. Circuit did address the content of that requirement. In *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), the court held that a compensatory award under the IDEA was one requiring, among other things, programs to make up for prior educational deficiencies. *Id.* at 522. The court distinguished this relief from prospective correction of a deficient IEP, noting that an IEP conforming to the some-benefit test "carries no guarantee of undoing damage done by prior violations." *Id.* at 523. By contrast, the meaningful-benefit test employed below would likely require an IEP to undo such damage, because an education that failed to compensate for earlier, redressable educational injuries could hardly be deemed meaningful.

2. Not only is this circuit split real, it has grave constitutional and educational consequences. As the *Rowley* Court warned, federal courts "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" 458 U.S. at 208. Consistent with this warning, the objective some-benefit test prevents courts from entangling themselves in educational issues for which they lack expertise. Pet. 17. If a program provides a measurable educational benefit that is not merely trivial—if, in other words, "it is 'likely to produce progress, not regression or trivial educational advancement,'" *Alex R.*, 375 F.3d at 615 (internal quotation marks and citation omitted)—then a court's inquiry under the some-benefit test is at an end.

In contrast, the meaningful-benefit test will require federal courts to make subjective educational policy judgments for which they have no expertise. And, this in turn will force educators to practice a form of defensive (and unduly expensive) education. Pet. 17-18. Indeed, as *amici* explain, educating the rapidly growing population of autistic children is enormously expensive and entails complex medical and educational policy judgments that are the subject of ongoing debate. *Amici* Br. 8-11. The meaningful-benefit test improperly thrusts federal courts into the midst of this unresolved debate.

Additionally, the test runs afoul of the Spending Clause's "unambiguous" obligation requirement. Pet. 18. Indeed, given its inherent subjectivity, this test prevents States from determining the scope and nature of the obligations they are assuming when they accept federal education funds. Nor is this the only federalism concern the test raises. *Amici* Br. 15-18. For example, the IDEA "leaves states free to adopt a higher burden for establishing FAPE under state law, including a 'meaningful educational benefit' if states so desire." *Id.* at 17-18 (citing 20 U.S.C. § 1401(9)(B)). States

are denied this flexibility, however, under a standard that mandates such a result.

3. This case also raises a closely related and equally important question regarding the evidence necessary to establish the procedural violation of predetermination. As petitioner has previously explained, the lower court's finding of such a violation was inextricably intertwined with the central substantive question. Pet. 19; see also *Amici* Br. 14 ("At base, the predetermination decision is just another means of expressing the disagreement of the Sixth Circuit with the school district's determination of the educational methodology that should be employed to serve Zachary.").

Here, there is no dispute that Zachary received "some educational benefit." Thus, it is inaccurate to suggest, as the lower court did, that petitioner decided that "because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability," regardless of whether the program provides an educational benefit to a particular child. Pet. App. 28a-29a. Rather, in finding predetermination here, the lower court effectively ruled that it is unlawful for a school system to decide to use an existing program that affords a child a nontrivial educational benefit, even though other, more expensive programs may confer greater benefits on that child.

This ruling has profound implications for school boards. It allows parents to dictate unilaterally their children's IEP placements by inflexibly adopting hard bargaining positions, then arguing that the school board's failure to accede to some or all of those demands is evidence of predetermination. It also discourages expert educators from preparing diligently for IEP meetings and using their best educational judgment, and invites litigation. *Amici* Br. 13-15. Finally, the test inappropriately penalizes educators working in a world of limited resources for considering the cost implications of an educational program for one student.

4. Unable to defend the propriety of the decision below, respondents contend the petition should be denied because the case "comes to this Court in an interlocutory posture." Opp. 29. They also obliquely suggest that the lower court's findings of other procedural violations is an independent basis for the judgment below. *Id.* at 29-30. Neither claim has merit.

It is well-established that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002); see also 28 U.S.C. § 1254(1). This rule is borne out by the actual practice of this Court. In a recent Term, this Court reviewed over a dozen such interlocutory cases,[1] including numerous cases arising in a posture similar to the case at bar. Likewise, in the instant case, delaying review for trial on an improper legal standard would simply waste federal judicial resources.

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[1] *E.g.*, *City of Los Angeles* v. *David*, 538 U.S. 715 (2003) (reviewing reversal of summary judgment); *Clackamas Gastro. Assocs., P.C.* v. *Wells*, 538 U.S. 440 (2003) (same); *City of Cuyahoga Falls, Ohio* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (same); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (same); *Boeing Co.* v. *United States*, 537 U.S. 437 (2003) (same); *Bordon Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (per curiam) (same); *see also Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (reviewing partial affirmance and partial reversal of summary judgment); *Dow Chem. Co.* v. *Stephenson*, 539 U.S. 111 (2003) (per curiam) (reviewing reversal of dismissal of case); *Inyo County, Cal.* v. *Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (same); *Cook County, Ill.* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (same); *United States* v. *White Mt. Apache Tribe*, 537 U.S. 465 (2003) (same); *Meyer* v. *Holley*, 537 U.S. 280 (2003) (same); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (same); *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003) (reviewing reversal of preliminary injunction); *Pharm. Res. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003) (same).

Furthermore, there is little or no chance that future events in the district court would render this case moot before this Court rules on the petition. Aside from ordering a scheduling conference, the district court has taken no action since it received the Sixth Circuit's mandate in April 2005. Indeed, the district court's docket reflects the court's awareness that the petition for certiorari is pending. Furthermore, district court action to protect prospectively Zachary's educational interests would be unnecessary, because the parties agreed to an IEP by which Zachary is currently being educated in a public school program. Of course, if the Court grants the petition, it would have jurisdiction to protect its jurisdiction, and could stay any district court proceedings. 28 U.S.C. § 1651(a). Accordingly, future events will not render this case moot.

Finally, the lower court's conclusion that petitioner violated the IDEA by failing to provide a regular education teacher's participation in the IEP meetings is not an independent basis for the judgment below. As the lower court recognized, a procedural violation is not a basis for relief unless it causes "substantive harm." Pet. App. 31a. The lower court's determination that this procedural violation caused harm is thus inextricably tied to the erroneous substantive standard it adopted. Accordingly, reversal of that standard would, at a minimum, necessitate reversal and reconsideration of the lower court's finding of a harmful procedural violation.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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